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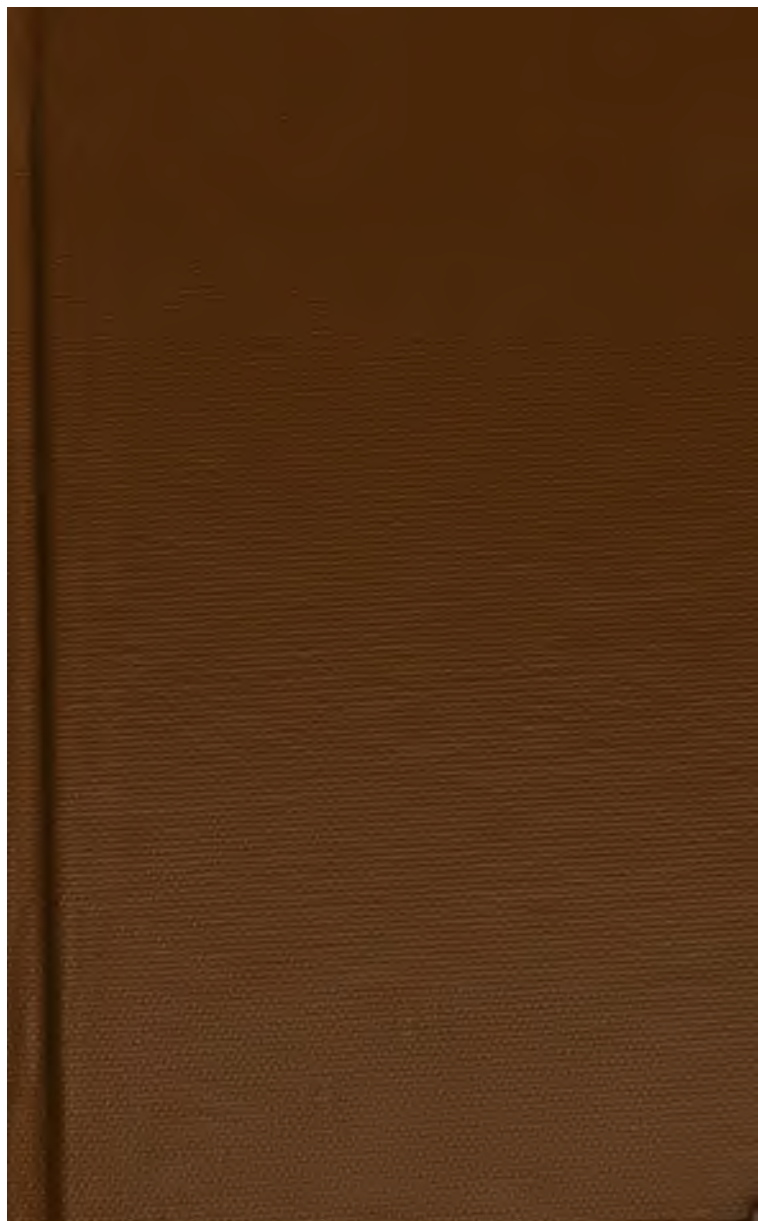
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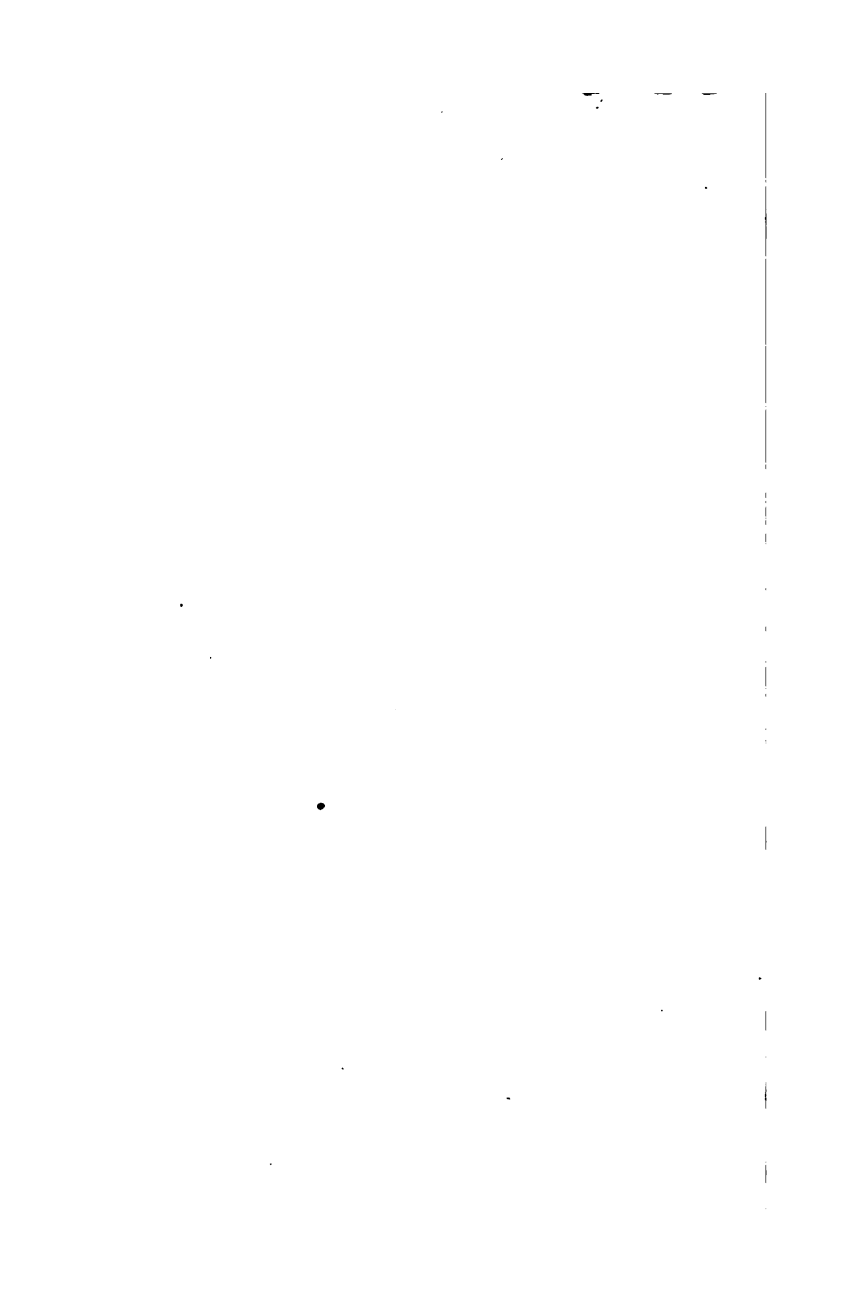
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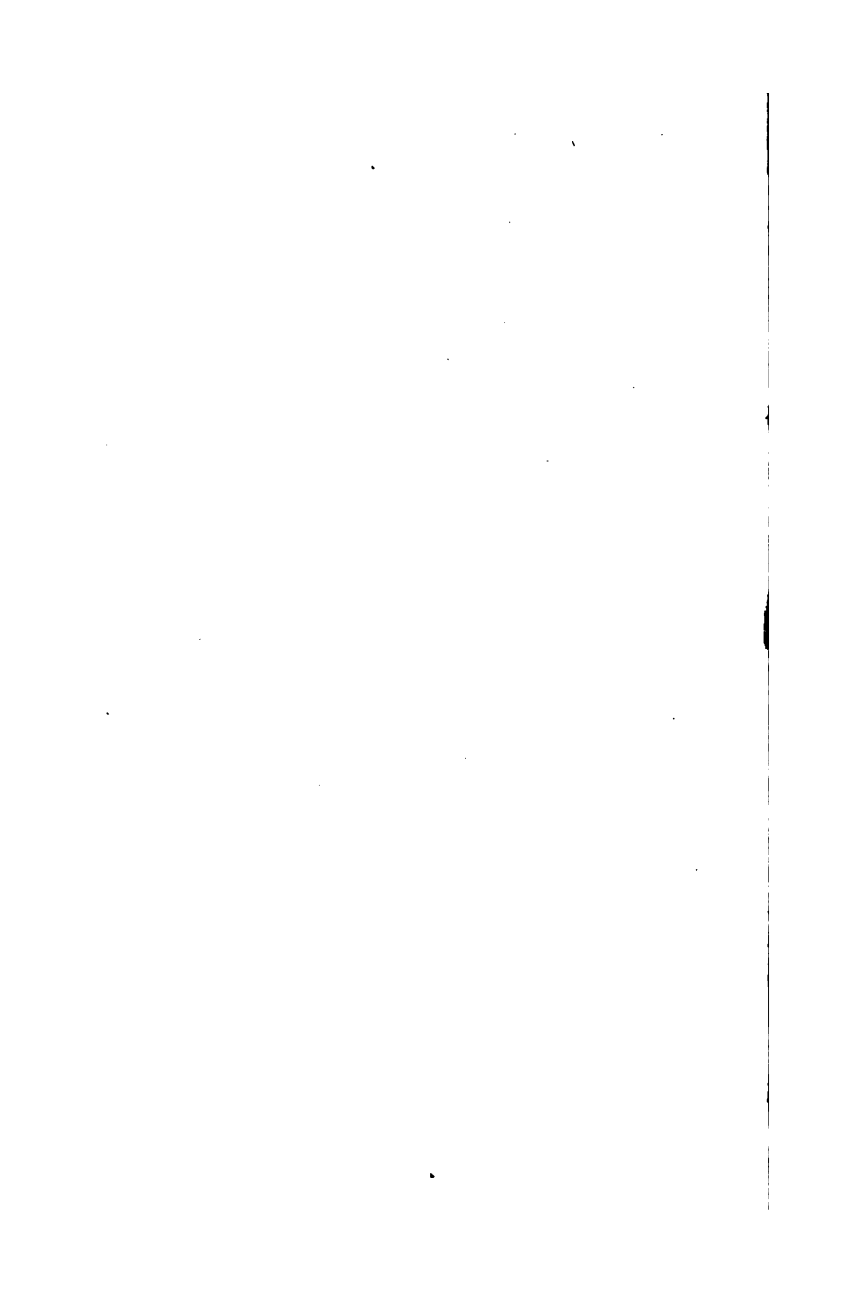
JAMES D. PHELAN





A. G. Warner

A MANUAL
OF THE
LAW OF CORPORATIONS.



A MANUAL
OF
THE LAW
APPLICABLE TO CORPORATIONS

GENERALLY :

Including, also,

**GENERAL RULES OF LAW PECULIAR TO BANKS, RAIL-
ROADS, RELIGIOUS SOCIETIES, MUNICIPAL
BODIES, AND VOLUNTARY
ASSOCIATIONS,**

As determined by the leading Courts of England and the United States.

BY
CHARLES T. BOONE, LL.B.

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PREFACE.

THE aim of this work is to present to the profession a full view of the law of corporations, as now determined by the leading courts of England and the United States, in as brief a space as is consistent with accuracy and clearness of statement. To this end, an effort has been made to discard all obsolete law on the one hand, and to avoid all disquisitions as to what the law ought to be, on the other. In plan and execution, no pains have been spared to produce a work that will economize the time and labor of the busy lawyer, and furnish him a safe guide in the investigation of questions constantly arising out of the transactions of corporate bodies. And whatever demerits may mar the execution of the undertaking, it is confidently believed that they are more than counterbalanced by the advantages incident to the plan adopted. In the hope that its practical usefulness will be fairly proportioned to the labor bestowed upon it, the work is submitted to the judgment of a candid profession.

CHARLES T. BOONE.

JOHNSTOWN, N. Y., October, 1881.



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- § 12. What bodies are not corporations.

§ 1. **Definition.**—A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law;¹ and it possesses only those properties and powers which are conferred upon it by its creator.² Its existence depends upon a legislative act, to which it either mediately or immediately owes its vitality.³ It is a collection of individuals united into one body, having perpetual succession under the corporate name, and vested by the policy of the law with the capacity to transact certain kinds of business like a natural person; and such a union can only be effected under a grant of privileges from the sovereign power of the State.⁴

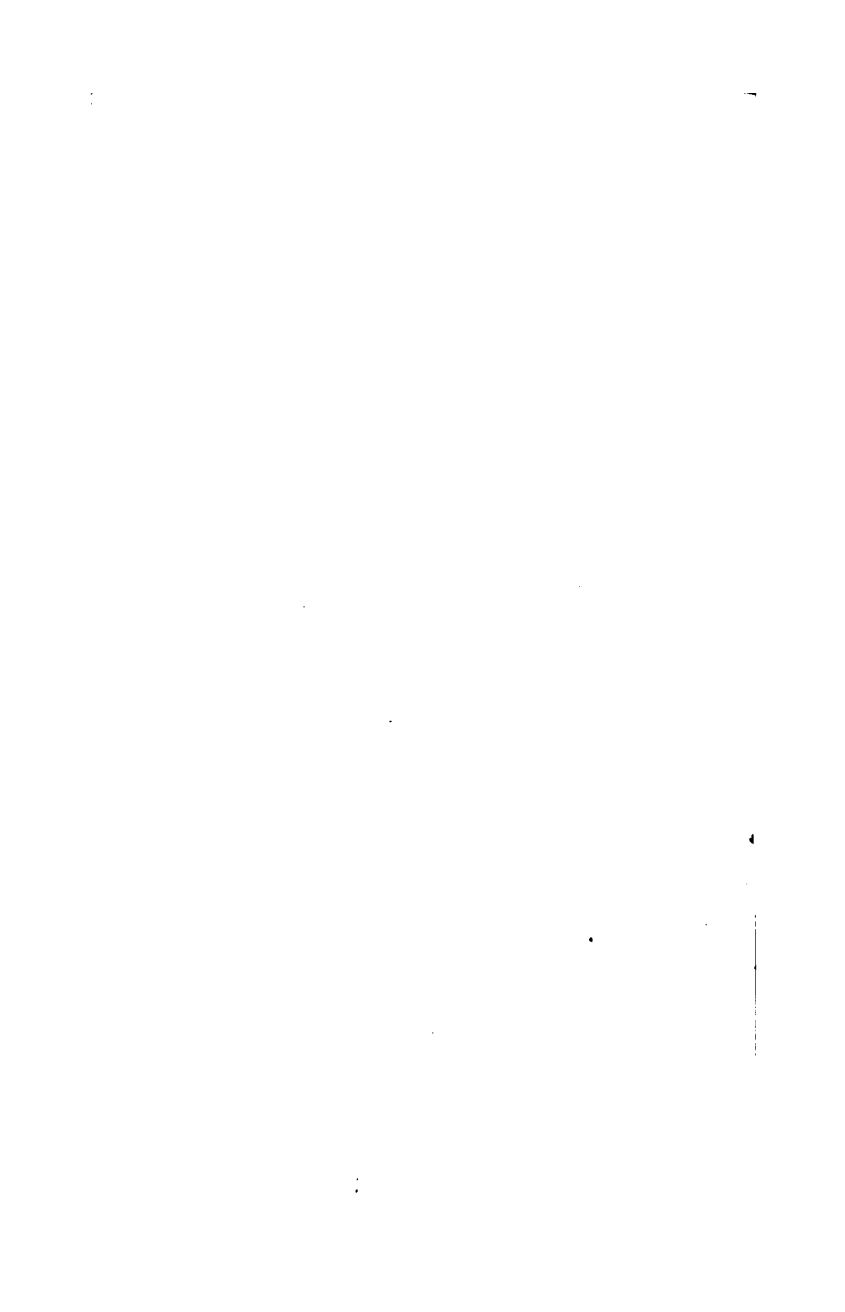
¹ Case of Sutton's Hospital, 10 Co. Rep. 32 b; *People v. Assessors of Watertown*, 1 Hill, 616.

² *Dartmouth College v. Woodward*, 4 Wheat. 518, 636; *Head v. Providence Ins. Co.* 2 Cranch, 127; *Weckler v. First Nat. Bank*, 42 Md. 581.

³ *Paschall v. Whitsett*, 11 Ala. N. S. 472; *Franklin Bridge Co. v. Wood*, 14 Ga. 80; *Atkinson v. Marietta etc. R. R. Co.* 15 Ohio St. 21.

⁴ *People v. Assessors of Watertown*, 1 Hill, 616.

§ 2. **Properties of a corporation.**—Among the properties conferred upon a corporation, in order to effect the
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1 Case of Sutton's Hospital, 10 Co. Rep. 32 b; *People v. Assessors of Watertown*, 1 Hill, 616.

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§ 2. Properties of a corporation.—Among the properties conferred upon a corporation, in order to effect the
BOONE CORP.—1.

object of its creation, the most important are immortality and individuality; properties, by means of which, a perpetual succession of many persons is considered as the same, and may act as a single individual.¹ The immortality of a corporation means no more than a continued succession of members during the period allotted for the existence of the corporation.²

1 *Dartmouth College v. Woodward*, 4 Wheat. 518, 636; *Providence Bank v. Billings*, 4 Peters, 514, 532.

2 *People v. Assessors of Watertown*, 1 Hill, 616. And see *Fuller v. Plainfield Academic School*, 6 Conn. 532; *Wilcox v. Wheeler*, 47 N. H. 498.

§ 3. Separate existence of corporation.—The powers and franchises with which a corporation aggregate is endowed, are regarded as subsisting in the corporation itself, as distinctly as if it were a real personage.¹ The members individually are lost in the corporate existence, and it is the legal being which acts and transacts business;² and this legal being, or corporate body, is separate and distinct in its rights and obligations from the individuals who compose it.³ An individual corporator may sue his corporation, and the corporation may sue a corporator.⁴

1 *Brunswick v. Dunning*, 7 Mass. 445, 447.

2 *People v. Assessors of Watertown*, 1 Hill, 616.

3 *Curian v. Santini*, 16 La. An. 27; and see *Soc. of Practical Knowledge v. Abbott*, 2 Beav. 560.

4 *Culbertson v. Wabash Nav. Co.* 4 McLean, 544; *Barnstead v. Empire Mining Co.* 5 Cal. 239; *Rogers v. Dauby University*, 19 Vt. 187; *Ex parte Booker*, 18 Ark. 338.

§ 4. In what sense deemed "persons."—In certain respects, and for certain purposes, corporations are deemed "persons." And the general rule of construction is, that corporations are entitled to the rights or the remedies conferred by a statute upon "persons" if they fall within the general reason and design of the act.¹ Corporations have been deemed persons within attachment laws;² within insolvent laws;³ within statutes of usury;⁴ within the statute of limitations;⁵ within the meaning of a mill-

dam act;⁶ within the prohibition of an act to restrain unauthorized banking;⁷ within a statute imposing taxes on "persons,"⁸ or "persons and associations,"⁹ or an "individual";¹⁰ within a treaty clause against confiscation, and prosecutions against "any persons";¹¹ and the word "person" in the Civil Rights Act of Congress (U. S. Rev. Stat. § 1979) includes a corporation.¹² They are deemed "persons" not only for civil purposes, but also within the purview of penal statutes.¹³ But a corporation cannot be deemed a moral agent, and, like a natural person, be subjected to personal suffering.¹⁴ Malice and willfulness cannot be predicated of a corporation, though they may be of its members.¹⁵

1 School Directors v. Carlisle Bank, 8 Watts, 291; Commonwealth v. Phoenix Bank, 11 Metc. 129; Bank of Ithaca v. King, 12 Wend. 390; People v. Schoonmaker, 63 Barb. 44; Boyd v. Croydon Railway Co. 4 Bing. (N. C.) 668; Att.-Gen. v. New Castle, 12 Clark & F. 102.

2 Planters' Bank v. Andrews, 8 Port. (Ala.) 404; Mineral Point R. R. Co. v. Keep, 22 Ill. 9. Compare McQueen v. Middletown Manuf. Co. 16 Johns. 5.

3 State of Maryland v. Bank of Maryland, 6 Gill & J. 305.

4 Grand Gulf Bank v. Archer, 8 Smedes & M. 151; Commercial Bank v. Nolan, 7 How. (Miss.) 508.

5 Olcott v. Tioga R. R. Co. 20 N. Y. 210.

6 Fisher v. Horizon Co. 10 Wis. 351.

7 People v. Utica Ins. Co. 15 Johns. 353.

8 Clinton Manuf. Co. v. Morse, cited 15 Johns. 358.

9 International Life Assoc. Co. v. Comm'rs of Taxes, 23 Barb. 318; People v. Commissioners, 23 N. Y. 242.

10 Otis Co. v. Inhabitants of Ware, 8 Gray, 509.

11 Soc. for Prop. of Gospel v. New Haven, 8 Wheat. 464.

12 Northwestern Fertilizing Co. v. Hyde Park, 3 Bliss. 480.

13 United States v. Amedy, 11 Wheat. 392.

14 Riddle v. Proprietors etc. 7 Mass. 169, 186.

15 Cumberland etc. Canal Co. v. Portland, 58 Me. 77. Compare Johnson v. St. Louis Dispatch Co. 2 Mo. App. 565; Vinas v. Merchants' etc. Ins. Co. 27 La. An. 368; Stevens v. Mid. Railw. Co. 10 Exch. 352; Whitfield v. S. E. Ry Co. El. B. & E. 121; Owsley v. Mont. etc. R. R. Co. 37 Ala. 560.

§ 5. Purpose and use of.—Corporations are created in order to gain the united aid of many persons for the successful promotion of some design for the public good. It is to accomplish this object, that the legislature bestows the character and properties of individuality on a

collective and changing body of men.¹ And acts of incorporation ought never to be passed, but in consideration of services to be rendered to the public.²

1 *Providence Bank v. Billings*, 4 Peters, 514, 562.

2 *Currie v. Mut. Ins. Soc.* 4 Hen. & M. 347; and see *Milne v. Williams*, 11 Fred. 533.

§ 6. **How classified.**—A leading division of corporations at the common law is into sole and aggregate. A corporation sole consists of one person only, and his successors, of which the sovereign is an example.¹ So, all bishops of the Church of England, every parson and vicar, and some deans and prebendaries, are instances of corporations sole.² An instance of a sole corporation in Massachusetts, is that of a minister seized of parsonage lands, in the right of the parish;³ in New York, a supervisor of a town is a *quasi* sole corporation;⁴ and the governor of a state, as the head of the executive department, is a *quasi* corporation sole.⁵ A corporation aggregate is the union of several persons in one body politic, continued by a succession of members,⁶ familiar instances of which are, the mayor and commonalty of a city, the head and fellows of a college, the members of a trading company, etc.⁷ Corporations are further divided by the English law into ecclesiastical and lay. The former include all those whose members take a lively interest in the advancement of religion, and who are associated and incorporated for that object.⁸ In the United States, they are commonly called religious societies, which are not regarded as ecclesiastical corporations, in the sense of the English law, but as belonging to the class of civil corporations governed by the principles of the common law, as administered by the ordinary tribunals of justice.⁹ Lay corporations are divided into eleemosynary and civil.¹⁰ The former are private charities, having for their object the perpetual distribution of the alms and bounty of their founders;¹¹ and in this class are included hospitals for the sick and indigent,¹² colleges and academies for the promotion of learn-

ing and piety,¹³ institutions for the instruction of the deaf and dumb, etc.¹⁴ A corporation for these purposes, which is endowed solely by private benefactions, is a private eleemosynary corporation, although created by charter from the government.¹⁵ In the English law, the distinguishing characteristic of eleemosynary corporations is, that they have no incidental power of legislation; being the mere creatures of their founder, he alone has a right to prescribe the regulations according to which his charity shall be applied.¹⁶ But he cannot, by his statutes, alter the constitution of the charity as fixed in the charter granted to him.¹⁷ A state legislature may enact laws to control the affairs of public educational institutions, endowed exclusively by the state.¹⁸ Civil corporations are such as are created for an almost infinite variety of temporal and worldly purposes, and are either public or private.¹⁹

1 Co. Litt. 43; Overseers etc. v. Sears, 22 Pick. 122, 125; Dartmouth College v. Woodward, 4 Wheat. 518.

2 1 Bl. Com. 469; and see King v. Baylay, 1 Barn. & Adol. 761.

3 Weston v. Hunt, 2 Mass. 501; Overseers etc. v. Sears, 22 Pick. 125.

4 Jansen v. Ostrander, 1 Cowen, 670.

5 The Governor v. Allen, 8 Humph. 176.

6 People v. Assessors of Watertown, 1 Hill, 616.

7 1 Bl. Com. 469.

8 Terrett v. Taylor, 9 Cranch, 43; and see Selden v. Overseers of Poor, 11 Leigh (Va.) 127.

9 Robertson v. Bullions, 11 N. Y. 243; Watkins v. Wilcox, 4 Hun, 220; S. C. 6 Sup. Ct. (T. & C.) 539; see also Silsby v. Barlow, 16 Gray, 329; Watson v. Jones, 13 Wall. 679.

10 Dartmouth College v. Woodward, 4 Wheat. 518.

11 Soc. for Prop. of Gospel v. New Haven, 8 Wheat. 464.

12 American Asylum v. Phoenix Bank, 4 Conn. 172; McKim v. Odorn, 3 Bland Ch. 407.

13 Vincennes University v. Indiana, 14 How. 268; State v. Adams, 44 Mo. 570.

14 American Asylum v. Phoenix Bank, 4 Conn. 172.

15 Soc. for Prop. of Gospel v. New Haven, 8 Wheat. 464, 480.

16 Green v. Rutherford, 1 Ves. sr. 462; St. John's College v. Todington, 1 Burr. 158; S. C. 1 W. Bl. 71; Phillips Academy v. King, 12 Mass. 546.

17 Reg. v. Dulwich College, 17 Q. B. 600; S. C. 8 Eng. L. & Eq. 385.

18 Dart v. Houston, 22 Ga. 506. Compare State v. Adams, 44 Mo. 570.

19 See *People v. Morris*, 13 Wend. 325, 337; *Bennett's Appeal*, 65 Pa. St. 242; *Dean v. Davis*, 51 Cal. 406; *Bushell v. Com. Ins. Co.* 15 Serg. & R. 186; *Foster v. Fowler*, 60 Pa. St. 27.

§ 7. Public and private corporations distinguished.—Public corporations are generally esteemed such as are created for political purposes only,¹ with powers to be exercised for the public good.² But strictly speaking, public corporations are such only as are founded by the government for public purposes, where the whole interests belong also to the government.³ Corporations not created for political purposes, or the whole interests in which do not belong to the government creating them, are private.⁴ The mere fact that the government creating a corporation owns all the stock, does not, if none of the incidents of sovereignty are conferred upon it, render it public.⁵ A division of corporations into three classes, is as follows: 1. Public municipal corporations, the object of which is to promote the public interests; 2. Corporations, technically private, but of a *quasi* public character, having in view some public enterprise in which the public interests are involved, such as railroads, turnpike, canal, steamboat, and steamship companies; and 3. Corporations strictly private.⁶ Over public corporations proper, the legislature, as the trustee or guardian of the public interests, has the exclusive and unrestrained control.⁷ But the grant of corporate franchises to a private corporation becomes a contract executed;⁸ and the legislature has no power to summarily repeal the charter, or otherwise impair the obligation of such contract, without the consent of the corporators, the other party.⁹ But this principle does not preclude the legislature from taking their franchise and property in virtue of eminent domain.¹⁰

1 *People v. Morris*, 13 Wend. 325; *People v. Hurlburt*, 24 Mich. 44; *Hamilton County v. Mighels*, 7 Ohio St. 103; *Treadwell v. Commissioners*, 11 id. 190; *Soper v. Henry County*, 26 Iowa, 264; *Bonaparte v. Camden etc. R. R. Co.* Baldw. 205; *Morey v. Town of Newfauc*, 8 Barb. 645.

2 *Tinsman v. Belvidere etc. R. R. Co.* 26 N. J. L. 148.

3 *Dartmouth College v. Woodward* 4 Wheat. 518, 562; *Rundel v. Del. etc. Canal Co.* 1 Wall. jr. 275.

4 *Ten Eyck v. Del. etc. Canal*, 18 N. J. L. 200; *U. S. Bank v. Planters' Bank*, 9 Wheat. 904.

5 *State Bank v. Gibbs*, 3 McCord, 377; *Bank of Ala. v. Gibson*, 6 Ala. 814; *State Bank v. Clark*, 1 Hawks (N. C.) 36.

6 *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543.

7 *McKim v. Odom*, 3 Bland Ch. 407; *Martin v. Dix*, 52 Miss. 53; *Barnes v. District of Columbia*, 91 U. S. 540; *Davidson v. Mayor of N. Y.* 27 How. Pr. 342.

8 *Franklin Branch Bank v. Ohio*, 1 Black, 474; *Boston etc. R. R. Co. v. Salem etc. R. R. Co.* 2 Gray, 1.

9 *Bally v. Mayor of N. Y.* 3 Hill, 531; *Flint etc. Plank Road Co. v. Woodhull*, 25 Mich. 99; *Allen v. Buchanan*, 9 Phil. (Pa.) 283; *Mowrey v. Indianapolis etc. R. R. Co.* 4 Bias. 78; *Cleveland etc. R. R. Co. v. Spear*, 56 Pa. St. 325.

10 *N. Y. etc. R. R. Co. v. Boston etc. R. R. Co.* 36 Conn. 196; *Crosby v. Hanover*, 36 N. H. 404; *Matter of Buffalo*, 68 N. Y. 167; *Little Miami etc. R. R. Co. v. Dayton*, 23 Ohio St. 510.

§ 8. What corporations held to be public.—Generally speaking, towns, cities, parishes, and counties are public corporations.¹ A county is a public corporation, which is created by the mere will of the legislature; and in this respect differs from private corporations, where the legislature and parties interested contract for certain privileges on performing certain acts for the public good.² A bank created by the government for its own uses, whose stock is exclusively owned by the government, is, in the strictest sense, a public corporation.³ So a bank which issues bills for circulation as money is a public corporation.⁴ A corporation composed chiefly of officers of the government, having no personal interest in its concerns, and merely acting as the organs of the state in effecting a great public improvement, is a public corporation.⁵ Trustees of public schools are public corporations;⁶ and the board of school commissioners for a particular county is a public corporation in such sense that the charter may be altered or amended at the will and pleasure of the general assembly.⁷ Each one of the states of the Federal Union is in effect a public corporation;⁸ so, the United States is a corporation.⁹ But the state was held not to be a corporation within the United States internal revenue laws.¹⁰ A state university, originally the creature of the legislature, and dependent upon the legislative will for

its continuing existence, is a public institution and body politic; and the fact that private donations have been made to it does not alter the nature of the foundation nor the character of the corporation.¹¹

1 Bonaparte v. Camden etc. R. R. Co. Baldw. 205; Eastman v. Meredith, 35 N. H. 284.

2 Mills v. Williams, 11 Ired. 558; Maury County v. Lewis County, 1 Swan, 236; Laramie County v. Albany County, 92 U. S. 307; Barton County v. Walser, 47 Mo. 189; State v. McFadden, 23 Minn. 40.

3 U. S. Bank v. Planter's Bank, 9 Wheat. 904.

4 State v. Simonton, 78 N. C. 57.

5 Sayre v. Northern Turnpike Co. 10 Leigh, 454.

6 Trustees of Schools v. Tatman, 13 Ill. 27; Connell v. Woodard, 5 How. 665; and see Gilman v. Bassett, 33 Conn. 298; Williams v. Academic Assoc. 26 Ind. 310.

7 School Commissioners v. Putman, 44 Ala. 506; Farnum's Petition, 51 N. H. 376.

8 Indiana v. Woram, 6 Hill, 33; State v. Delesdenier, 7 Tex. 76; Cotton v. United States, 11 How. 229.

9 United States v. Maurice, 2 Brock. 96.

10 State v. Atkins, 35 Ga. 315.

11 University of No. Car. v. Maulsby, 8 Ired. Eq. 257; University of Alabama, 5 Stew. & P. 17.

§ 9. Private corporations.—Insurance, canal, bridge, turnpike companies, etc., where the stock is owned by individuals, are private corporations, though their use may be public.¹ So, if the stock of a banking corporation is owned by private individuals, the bank is a private corporation, although the public, through the legislature, exercise over it a supervisory power, and may annul its charter for cause.² A bank which, beyond a power to contract in its corporate name, has no powers beyond those which every other person possesses, must be deemed a private corporation.³ An incorporated academy is a private corporation, although it may derive a part of its support from the government.⁴ And colleges are in general private corporations.⁵ Railroad companies are deemed private corporations;⁶ so are canal companies;⁷ and although a corporation, such as a canal company, has been chartered for great public purposes, it may nevertheless be a private corporation.⁸ Corporations are

not public because their object is of a public character;⁹ and a corporation which was evidently created to advance the private interests of a certain class in the district incorporated, will be deemed a private corporation, although it may incidentally enhance the general prosperity of the whole community.¹⁰

1 *Balley v. Mayor of N. Y.* 3 Hill, 531; *St. Mary's Church*, 7 Serg. & R. 559; *Bonaparte v. Camden etc.* R. R. Co. Baldw. 205.

2 *Bank of Dubuque v. United States*, 1 Greene (Iowa) 553; *U. S. Bank v. Planters' Bank*, 9 Wheat. 904; and see *Turnpike Co. v. Wallace*, 8 Watts, 316.

3 *State v. Simonton*, 78 N. C. 57.

4 *Cleveland v. Stewart*, 3 Ga. 283.

5 *Allen v. McKeen*, 1 Sum. 276; *Dartmouth College v. Woodward*, 4 Wheat. 518.

6 *Tinsman v. Belvidere etc.* R. R. Co. 26 N. J. L. 148; *Sweatt v. Boston etc.* R. R. Co. 3 Cliff. 339; *Dearborn v. Boston etc.* R. R. Co. 4 Fost. (N. H.) 179.

7 *Ten Eyck v. Del. etc. Canal*, 3 Har. (Del.) 200.

8 *Brady v. State*, 26 Md. 290.

9 *Tinsman v. Belvidere etc.* R. R. Co. 26 N. J. L. 148.

10 *Directors etc. v. Houston*, 71 Ill. 318; and see *De Vose v. Richmond*, 18 Gratt. 333; *Weightman v. Washington*, 1 Black, 31; *New Orleans etc.* R. R. Co. v. *New Orleans*, 25 La. An. 453; *Comin'rs v. Detroit*, 28 Mich. 228; *Saving Fund Soc. v. Philadelphia*, 31 Pa. St. 175.

§ 10. *Quasi corporations.*—There are many instances, in the law, of collective bodies of men, coming under one general description, endowed with a corporate capacity in some particulars expressed, but who have, in no respect, the capacities incident to a corporation;¹ and these bodies are usually denominated *quasi corporations*.² Church-wardens,³ most of the commissioners instituted for public purposes,⁴ and guardians of the poor,⁵ are instances of *quasi corporations*. A public official body charged with the administration of the ministerial and financial duties of a county, such as highways, and the taxes, and having capacity to make contracts in reference to such matters, and to raise money therefor, and having perpetual succession, is a *quasi corporation*.⁶ The commissioners of a county in Pennsylvania are *quasi a corporation* for the purpose of suing and being sued.⁷ Counties are mere *quasi corporations*, invested with corporate

powers, *sub modo*.⁸ Provisions of a statute by which certain persons are made public agents to receive and disburse the school fund of a county, constitute them a *quasi* corporation.⁹ So, school trustees,¹⁰ and school districts,¹¹ are *quasi* corporations.¹² The governor of a state is a *quasi* corporation sole.¹³ And where statutes provide that the property of friendly societies and similar associations shall be vested in a trustee, or in the treasurer or secretary for the time being, and that actions shall be brought by and against him, such person is thereby created a *quasi* corporation sole.¹⁴

1 Jackson v. Hartwell, 8 Johns. 422; Denton v. Jackson, 2 Johns. Ch. 320; Withnell v. Gartham, 6 Term R. 336; Rew v. Pettit, 1 Ad. & E. 196; Clarissy v. Metrop. Fire Depart. 7 Abb. N. S. 352.

2 Mersey Docks etc. v. Gibbs, L. R. (1 H. L.) 293; Hartnall v. Ryde Commissioners, 1 Best & Smith, 351; Harris v. School District, 8 Post. (N. H.) 58; Hamilton County v. Mighels, 7 Ohio St. 109; Schriber v. Baum, 81 Pa. St. 835.

3 Ex parte Humesly, 2 Younge & C. 350; Bailey v. Foster, 3 Com. B. 215; Furnivall v. Coumbes, 6 Scott N. R. 537.

4 Hall v. Taylor, El. B. & E. 107; Att.-Gen. v. Andrews, 2 Macn. & G. 226; Conservators of River Tone v. Ash, 10 Barn. & C. 349.

5 Reg. v. Poor Law Comm'rs, 9 Q. B. 291; Pomeroy v. Wells, 8 Paige, 406; Todd v. Birdsall, 1 Cowen, 250.

6 Levy Court v. Coroner, 2 Wall. 501; Comm'rs v. McPherson, 1 Spear, 218; Comm'rs v. Gherky, Wright, (Ohio) 493; and see People v. Lathrop, 19 How. Pr. 358.

7 Van Kirk v. Clark, 16 Serg. & R. 236.

8 Hannibal etc. R. R. Co. v. Marion County, 36 Mo. 294; Goodnow v. Comm'rs, 11 Minn. 31; Louisville etc. R. R. Co. v. County Court of Davidson, 1 Sneed, 637; Grainger v. Pulaski, 26 Ark. 37; Ray County v. Bentley, 4 Mo. 236; Laramie County v. Albany County, 92 U. S. 307. Compare Smith v. Myers, 15 Cal. 33; People v. Supervisors of Sacramento, 45 Id. 632; and see § 8 ante.

9 O'Neal v. School Comm'rs, 27 Md. 229.

10 Littleworth v. Davis, 50 Miss. 403. See Bassett v. Fish, 75 N. Y. 303.

11 Inhabitants v. Wood, 13 Mass. 193; Beach v. Leahy, 11 Kans. 23.

12 See § 8 ante; People v. Bennett, 54 Barb. 480; People v. Dupuyt, 71 Ill. 651; People v. Trustees, 78 Id. 136.

13 Governor v. Allen, 8 Humph. 176.

14 See Cartridge v. Griffiths, 1 Barn. & Ald. 57.

§ 11. Municipal corporations.—At common law, a corporation aggregate for municipal purposes, is "an investing the people of a place with the local government thereof;"¹ instances of which are, incorporated villages,

towns, and cities.² Generally speaking, municipal corporations are created in this country at the will of the legislature, for the purpose of aiding in the administration of the government of the state,³ but chiefly to administer the local affairs of the city, etc., which is incorporated.⁴ As usually constituted, they are deemed to possess a double character—the one public, the other private.⁵ If the powers conferred be granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character; but if the grant was for purposes of private advantage, or emolument, though the public may derive a common benefit therefrom, the corporation, *quo ad hoc*, is to be regarded as a private company.⁶

1 *Cuddeon v. Eastwick*, 1 Salk. 192; and see *Brinckerhoff v. Board of Education*, 37 How. Pr. 499; S. C. 2 Daly, 443; *People v. Hurlbut*, 24 Mich. 44.

2 *People v. Morris*, 13 Wend. 325; *New Orleans etc. R. R. Co. v. New Orleans*, 26 La. An. 473; *Harris v. School District*, 23 N. H. 53.

3 *City v. Shields*, 52 Mo. 351; *Girard v. Philadelphia*, 7 Wall. 1; *Rader v. Road District*, 36 N. J. L. 273; *Mayor of Hagerstown v. Schner*, 37 Md. 180; *San Francisco v. Canavan*, 42 Cal. 541; *Barnes v. District of Columbia*, 91 U. S. 540; *Vance v. Little Rock*, 30 Ark. 435.

4 *Hamilton County v. Mighels*, 7 Ohio St. 109; *Ward v. County of Hartford*, 12 Conn. 404, 406.

5 *Bailey v. Mayor of N. Y.* 3 Hill, 531.

6 *Bailey v. Mayor of N. Y.* 3 Hill, 531; and see *Maxmillan v. Mayor of N. Y.* 62 N. Y. 160; S. C. 20 Am. R. 498; *De Vass v. Richmond*, 18 Gratt. 338; *Western College v. Cleveland*, 12 Ohio St. 375; *Mead v. New Haven*, 40 Conn. 72; S. C. 16 Am. R. 14.

§ 12. What bodies are not corporations. Companies or societies not expressly sanctioned by the legislature, pursuant to some special or general law, are usually deemed nothing more than ordinary partnerships.¹ A "board of brokers" is not, strictly speaking, a corporation, or a partnership, or a joint stock company.² Boards of health in New York are not corporations, as respects the power to sue and be sued.³ Nor is the board of supervisors of a county a corporation.⁴ The general assembly of the Presbyterian Church in Pennsylvania, is not a *quasi* corporation, not having the capacity to sue and be sued

as an artificial person.⁵ But a body formed pursuant to a statute authorizing the formation of "associations," and declared by the statute to be, when duly formed, a body corporate and politic, is to be deemed a corporation, and not a *quasi* corporation, nor a joint-stock company or limited partnership.⁶ The fact that the act of parliament creating an English joint-stock company, expressly declares it not to be a corporation, yet grants powers of a corporate nature to the company, cannot prevent it from being treated as a corporation in this country;⁷ and it may be taxed as a "foreign corporation."⁸

1 Bullard v. Kinney, 10 Cal. 69; Moore v. Brink, 4 Hun, 402; Lafond v. Deems, 52 How. Pr. 41; Butterfield v. Beardsley, 24 Mich. 412; Greenwood's Case, 23 Eng. L. & Eq. 422. Compare Cox v. Bodfish, 35 Me. 302.

2 Leech v. Harris, 2 Brews. (Pa.) 571; White v. Brownell, 3 Abb. Pr. N. S. 318.

3 Gardner v. Board of Health, 10 N. Y. 409; and see Appleton v. Water Comm'rs, 2 Hill, 432.

4 Boyce v. Supervisors of Cayuga, 20 Barb. 294.

5 Com. v. Green, 4 Whart. 531.

6 Falconer v. Campbell, 2 McLean, 195; and see Gillet v. Phillips, 13 N. Y. 114; Leavitt v. Blatchford, 17 Id. 521.

7 Liverpool Ins. Co. v. Massachusetts, 10 Wall. 563.

8 Oliver v. Liverpool Ins. Co. 100 Mass. 531; S. C. aff'd, 10 Wall. 563.

CHAPTER II.

CREATION OF CORPORATIONS.

- § 13. Power to create, generally.
- § 14. Corporations at common law.
- § 15. Corporations by prescription.
- § 16. Corporations implied.
- § 17. Corporations by royal charter.
- § 18. Creation by act of incorporation.
- § 19. Creation by delegated power.
- § 20. Restrictions on legislative power to create.
- § 21. Incorporation under general acts.
- § 22. Words of incorporation.
- § 23. Acceptance of grant.
- § 24. Acceptance, when not required.
- § 25. Construction of incorporating acts.

§ 13. Power to create, generally.—The sovereign authority only is competent to create a corporation.¹ Formerly, in England, both public and private corporations were created by royal prerogative, without the intervention of parliament;² but the usual mode in which corporations are now called into being, is by authority of parliament.³ And, in the United States, they can only be created by authority of the legislature.⁴ A corporation cannot be constituted by agreement of parties.⁵

¹ *M'Culloch v. State of Maryland*, 4 Wheat. 316, 424.

² See *Robinson v. Jones*, 14 Florida, 256; *Bushwell v. Insurance Co.* 15 Serg. & R. 176; *Railroad Co. v. Dalby*, 19 Ill. 353.

³ See *Reg. v. Boucher*, 3 Q. B. 654; *Rutter v. Chapman*, 8 Mees. & W. 1.

⁴ *Franklin Bridge Co. v. Wood*, 14 Ga. 80; *Atkinson v. Marietta etc. R. R. Co.* 15 Ohio St. 21; *Mayor of Mobile v. Moog*, 53 Ala. 561; *McPherson v. Foster*, 43 Iowa, 48; S. C. 22 Am. R. 213.

⁵ *Stowe v. Flagg*, 72 Ill. 397.

§ 14. Corporations at common law.—Corporations existing by virtue of the common law are supposed to have been warranted by the universal assent of the community

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from the most remote period. The tenure of the king, of all bishops, parsons, vicars, deans, etc., to their respective offices, is based upon this principle.¹

1 Town of Pawlet v. Clark, 9 Cranch, 292; Terrett v. Taylor, 9 Id. 42.

§ 15. Corporations by prescription.—Corporations by prescription presuppose a grant by charter or act of parliament, which has been lost by such accidents as length of time may produce.¹ But this origin must be clearly proved.² Corporations may exist in this country by prescription;³ and if no charter or act of incorporation can be found, incorporation may be proved by reputation,⁴ or by user of the corporate powers.⁵ Where no act of incorporation could be found of a parish, which had existed more than forty years, evidence was admitted to prove its incorporation by reputation.⁶ So, parol proof, tending to show the existence of an act incorporating a town with the ordinary powers and privileges, was deemed admissible at the expiration of thirty years.⁷ To establish the existence of a corporation *de facto*, the acts relied upon to show user must in their nature be corporate acts,⁸ or such as would be corporate acts if the attempted incorporation had been perfected, and they must be unequivocally such.⁹

1 Jenkins v. Harvey, 2 Crompt. M. & R. 339; Town of Pawlet v. Clark, 9 Cranch, 292.

2 Reg. v. Durham, 10 Mod. 146.

3 Robie v. Sedgwick, 35 Barb. 319.

4 Barnes v. Barnes, 6 Vt. 388; Bow v. Allentown, 34 N. H. 351; State v. Fitzsimmons, 30 Mo. 236.

5 Buffalo etc. R. R. Co. v. Cary, 26 N. Y. 75; Way v. Billings, 2 Mich. 397; and see People v. Frank, 28 Cal. 507.

6 Dillingham v. Snow, 5 Mass. 547.

7 Stockbridge v. West Stockbridge, 12 Mass. 400.

8 Greene v. Dennis, 6 Conn. 232.

9 DeWitt v. Hastings, 8 Jones & S. 463; affirmed, 69 N. Y. 518.

§ 16. Corporations implied.—If a body of men, lawfully constituted, cannot carry into effect the purposes intended, except when acting in a corporate capacity, a

corporation is created by implication.¹ An act requiring the supervisors of a county to erect a portion of a county into a levee district, to exercise corporate powers, makes such district so organized by the supervisors a corporation, although the act does not in terms declare it a corporation.² A statute annexing other territory "to the town of A" must, by implication, make it a town, if it was not a town before.³ Where representation in certain cases is confined to towns, a grant to a place within the constitutional designation, of the power to send a representative, makes the place a town by implication.⁴ An act authorizing the judges of a particular court to take bonds to themselves in their official capacity, confers on them, as to such bonds, a corporate character.⁵ An act incorporating a bank, in which no persons were named as corporators, but the fund was placed under the management of directors to be elected by the legislature, and upon whom the usual banking powers were conferred, creates a corporation by necessary implication from the language of the act.⁶ A conveyance of land by sovereign authority, to a body of men with their associates and successors, to be held for public purposes of a municipal nature, creates a *quasi* corporation.⁷ A legislative act, which by necessary implication recognizes a corporation as an existing one, is, as far as individuals are concerned, conclusive evidence of its being a valid corporation.⁸ A defect in the certificate of incorporation under a general statute is cured by a legislative recognition of the corporation.⁹ But, if the creation of corporations except by general laws is forbidden, the mere recognition of a corporate body, as an existing corporation, in acts of the Legislature, cannot operate to give the organization validity.¹⁰

¹ *Conservators of River Tone v. Ash*, 10 B. & Cr. 349; *Jefferys v. Gurr*, 2 Barn. & Adol. 833; *Com. v. Westchester R. R.* 3 Grant Cas. 200; *Thomas v. Dakin*, 22 Wend. 484; *Stebbins v. Jennings*, 10 Pick. 173. But see *Nell v. Board of Trustees*, 31 Ohio St. 15.

² *Dean v. Davis*, 51 Cal. 406.

³ *Bow v. Allenstown*, 34 N. H. 35.

⁴ *Bow v. Allenstown*, 34 N. H. 35.

5 *Justices etc. v. Armstrong*, 3 Dev. (N. C.) 284.

6 *Mahoney v. State Bank*, 4 Ark. 620; and see *Murphy v. State Bank*, 7 Id. 57.

7 *People v. Schermerhorn*, 19 Barb. 540; *Comm'rs v. Boyd*, 1 Ired. L. 194.

8 *Soc. for Prop. of Gospel v. Town of Pawlet*, 4 Peters, 430; *People v. Farnham*, 35 Ill. 563; *People v. Kingstou etc. Turnp. Co.* 23 Wend. 133.

9 *Basshor v. Dressel*, 34 Md. 503; and see *Kanawha Coal Co. v. Kanawha etc. Coal Co.* 7 Blatchf. 331; *St. Louis R. R. Co. v. Northern etc. Railway Co.* 2 Mo. App. 69.

10 *Oroville etc. R. R. Co. v. Supervisors*, 37 Cal. 354.

§ 17. Corporations by royal charter.—Most of the corporations that arose in England during the middle ages were created by royal charter, in the form of letters patent, under the great seal;¹ and a few existing corporations in this country, of different kinds, owe their origin to the English crown under the colony administration.² The city of Annapolis, in Maryland, was incorporated by a charter from Queene Anne, when she held the government of the province.³ The granting of charters being a branch of the royal prerogative, it was formerly asserted that the act of incorporation must be the immediate act of the sovereign;⁴ but the law has since been unquestioned, that the crown may not only grant a license to a subject to erect a particular corporation, but may confer a general power by charter to create corporate bodies indefinitely.⁵ The king cannot, however, incorporate a body of men without their consent, and until his charter has been accepted, it is inoperative.⁶ It must be accepted by those to whom it is addressed;⁷ and it must be accepted or rejected *in toto*;⁸ a charter cannot be accepted in part without the assent of the crown.⁹ The English Municipal Corporations Act¹⁰ empowers the crown to incorporate any town, in accordance with its provisions, on the presentation of a petition by its inhabitants.¹¹

1 Bl. Com. 272, 473.

2 See *Stockbridge v. West Stockbridge*, 12 Mass. 400; *Town of Pawlet v. Clark*, 9 Cranch, 232.

3 3 Bland, 416, note.

4 10 Co. Rep. 27.

5 *Fazakerly v. Wiltshire*, 1 Strob. 462; 1 Bl. Com. 473; *McKim v. Odom*, 3 Bland, 416.

6 *Bagg's Case*, 1 Rolle, 224; *Rex v. Vice-Chancellor*, 3 Burr. 1647; and see *Ellis v. Marshall*, 2 Mass. 269.

7 *Lincoln v. Kennebec Bank*, 1 Me. 79.

8 *Ewre v. Strickland*, Cro. Jac. 240; *Rex v. Passmore*, 3 Term R. 575.

9 *Rex v. Westwood*, 2 Dowl. 21; S. C. 7 Bing. 1, 90.

10 Stat. of 5 & 6 Will. 4, ch. 76.

11 See *Reg. v. Boucher*, 3 Q. B. 634; *Rutter v. Chapman*, 8 Mees. & W. 1.

§ 18. Creation by acts of incorporation.—In England, corporations are now created either by special act of parliament, or individuals in a manner incorporate themselves under the provisions of general statutes enacted for that purpose.¹ And in this country, all corporations, public and private, exist and can only exist by virtue of legislative sanction.² Even in the rare and exceptional instances of prescriptive corporations, a legislative grant is supposed.³ The power of Congress to create or authorize the creation of corporations is conclusively settled;⁴ although the power of creating a corporation is not included in the enumerated powers of the national government, the great fiscal powers which are enumerated give the implied power to create a corporation, if the existence of such a being is essential to those powers.⁵ So, a state may grant acts of incorporation for the attainment of those objects which are essential to the existence of society.⁶ So, also, a territorial legislature, vested with general legislative powers, may create a corporation,⁷ which is not affected by the subsequent adoption of a state constitution.⁸ And in the case of a territory which is about to become a state, until the territorial government ceases to exist, by the admission of the new state into the Union, the power to create corporations rests wholly in the territorial government, and not in the newly formed state legislature.⁹

1 See § 13. *ante*.

2 *Stowe v. Flagg*, 72 Ill. 397; *Atkinson v. Marietta etc. R. R. Co.* 18 Ohio St. 21.

3 See § 15, *ante*.

4 *Osborn v. Bank of United States*, 9 Whart. 738; *Thomson v. Pacific R. R. Co.* 9 Wall. 579; *Pacific R. R. Co. v. Lincoln County*, 1 Dill. 314; *State v. Young*, 3 Kan. 445.

5 *McCulloch v. Maryland*, 4 Wheat. 316.

6 *Briscoe v. Bank of Commonwealth*, 11 Peters, 257; *Nichol v. Mayor etc.* 9 Humph. 252; *McPherson v. Foster*, 43 Iowa, 48; 8 C. 22 Am. R. 215; *Herzo v. San Francisco*, 33 Cal. 134; *Bank of Chenango v. Brown*, 26 N. Y. 467.

7 *Williams v. Bank of Michigan*, 7 Wend. 539; *Burnes v. Achison*, 2 Kan. 454; *Riddick v. Amelin*, 1 Mo. 5; *Vance v. Farmers etc. Bank*, 1 Blackf. 80.

8 *Vincennes University v. Indiana*, 14 How. 268; and see *People v. Marshall*, 1 Gilm. (Ill.) 672.

9 *Myers v. Manhattan Bank*, 20 Iowa, 263. See *Allen v. Pegram*, 16 Iowa, 163.

§ 19. **Creation by delegated power.**—Under the provincial government of Maryland, municipal corporations were created by or with the immediate sanction of the land proprietary or the monarch.¹ And prior to the revolution, charters of incorporation were granted by the proprietaries of Pennsylvania, under authority derived from the crown, which have been recognized since the revolution.² A similar power has been delegated by the legislatures of some of the states as it regards bridges³ and churches.⁴ It is by virtue of delegated power that a territory may establish corporations;⁵ and a provision in the organic act, that the power of the territorial legislature "shall extend to all rightful subjects of legislation," authorizes the legislature to create municipal corporations.⁶

1 *McKim v. Odom*, 3 Bland Ch. 416.

2 *Ang. & A. Corp.* § 74.

3 *Franklin Bridge Co. v. Wood*, 14 Ga. 801.

4 *St. Mary's Church*, 7 Serg. & R. 517.

5 *Vincennes University v. Indiana*, 14 How. 268; *Deitz v. City*, 1 Cal. 323.

6 *State v. Young*, 3 Kan. 445.

§ 20. **Restrictions on legislative power to create**
In the absence of any special provisions in the constitution of a state restricting the legislature, it may prescribe the functions and duties of corporations, and impose restraints upon them to the same extent as upon natural persons;¹ subject, however, to the limitation that it cannot

impair the obligation of the contract implied in the charter,² and cannot take the essential franchise without compensation.³ In the constitutions of some of the states the legislature is, in terms, required to provide a general law for the creation of all corporations, public and private.⁴ In others there is a provision that "the legislature shall pass no special act conferring corporate powers,"⁵ and this restriction is applied to municipal as well as to private corporations.⁶ But in most of the states the legislature is allowed, by the terms of the constitution, to create corporations for municipal purposes by special act.⁷ Under a provision of the constitution, that "corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes,"⁸ the legislature is restricted not only from creating in the strict sense of the term a business corporation by a special act, but also from conferring by a special act any powers or franchises upon a corporation.⁹ But extending the duration of an existing corporation is not the creation of a new one, which infringes upon a constitutional provision prohibiting the formation of corporations under a special act;¹⁰ nor does such provision prevent a special act changing the name of an existing corporation, and empowering it to acquire additional property.¹¹ So, an act remedying a technical defect in the organization of a corporation is not an act to create a corporation.¹²

1 *Brainer v. Conn. etc. R. R. Co.* 31 Vt. 214; *Gorman v. Pacif. R. R. Co.* 26 Mo. 441; *People v. Boston etc. R. R. Co.* 70 N. Y. 569; *Chicago etc. R. R. Co. v. Iowa*, 94 U. S. 155; *Stone v. Wisconsin*, id. 181; *Beer Co. v. Massachusetts*, 97 U. S. 25.

2 *Dartmouth College v. Woodward*, 4 Wheat. 513; *Jefferson Branch Bank v. Skelly*, 1 Black. 436; *Dodge v. Woolsey*, 18 How. 331; *State v. Dawson*, 22 Ind. 272; *Woodfork v. Union Bank*, 3 Cold. 383; *Mowrey v. Indianapolis etc. R. R. Co.* 4 Biss. 78; *Flint etc. Plank-road Co. v. Woodhull*, 25 Mich. 99; *Allen v. Buchanan*, 9 Phil. 233.

3 *Madison etc. R. R. Co. v. Whiteneck*, 8 Ind. 217; *Nelson v. Vermont etc. R. R. Co.* 28 Vt. 717.

4 *Iowa Const. of 1857*, art. 8, § 1; *Vou Phul v. Hamner*, 29 Iowa, 222; *Fla. Const. of 1865*, art. 4, § 20.

5 *Neb. Const. of 1867*, art. 8, §§ 1, 2; *Kans. Const. of 1859*, art. 12, § 1; *Ohio Const. of 1861*, art. 13, §§ 1, 2.

6 *State v. Cincinnati*, 20 Ohio St. 18; *Wyandotte City v. Wood*, 5 Kans. 603.

7 See Nev. Const. of 1864, art. 8, § 1; La. Const. of 1864, tit. 7, art. 121; N. Y. Const. of 1864, art. 8, § 1; Virginia City v. Mining Co. 2 Nev. 86; Tierney v. Dodge, 10 Minn. 171; 12 id. 41; Railroad Co. v. Plumas Co. 37 Cal. 354.

8 Cal. Const. of 1849, art. 4, § 31; Mich. Const. of 1850, art. 15, § 1.

9 San Francisco v. Spring Valley Water Works, 48 Cal. 493.

10 Cotton v. Miss. etc. Broom Co. 22 Minn. 372.

11 Wallace v. Loomis, 97 U. S. 146; and see Moers v. City of Reading, 21 Pa. St. 188.

12 Syracuse City Bank v. Davis, 16 Barb. 188.

§ 21. Incorporation under general acts.—The tendency of legislation in this country is, not to grant special charters, but to provide for the formation of corporations under general laws enacted for that purpose.¹ And this is so as it respects municipal, or public, as well as private corporations.² But where a corporation is to be created under the provisions of a general law, it is only by pursuing the provisions of the statute that corporate existence can be acquired;³ and non-compliance on the part of a company with such provisions is fatal to the act of incorporation.⁴ The regularity and validity of the organization of a corporation cannot, however, be questioned collaterally;⁵ but can be impeached only by some direct proceeding.⁶

1 See Chase v. Lord, 16 Hun, 369.

2 See Thomas v. Sheland, 12 Ohio St. 124; Welker v. Potter, 18 id. 85; Com. v. Montrose, 52 Pa. St. 301; Burke v. Jeffries, 20 Iowa, 143; Kayser v. Trustees etc. 16 Mo. 88.

3 Harris v. McGregor, 27 Cal. 124; Bigelow v. Gregory, 73 Ill. 197; Abbott v. Omaha Smelting Co. 4 Neb. 416; Childs v. Smith, 55 Barb. 45. But see Harrod v. Homer, 33 Wis. 162.

4 Field v. Cooks, 16 La. An. 153; Indianapolis etc. M. Co. v. Herkimer, 46 Ind. 142.

5 Aurora etc. R. R. Co. v. Lawrenceburgh, 56 Ind. 80; Ossipee Manuf. Co. v. Canney, 54 N. H. 275; Swartwout v. Mich. etc. R. R. Co. 24 Mich. 389; Blair v. Rutherford, 31 Tex. 465.

6 Thompson v. Candor, 60 Ill. 244.

§ 22. Words of incorporation.—The words "to found," "to erect or establish," or "to incorporate," are usually employed to indicate the intention to create a body politic, but they are not essential.¹ Corporations, public or private, may be established without any pre-

scribed form of words, or technical mode of expression.² And the omission in the act of incorporation of the words "to plead and be impleaded," or "to have a seal," or "to make by-laws," would not be an essential defeat;³ so, of the omission of the name, provided it could be ascertained from the terms of the act, or from the nature of the thing granted.⁴ The power which prescribes the formalities to be observed in order to create a corporation is able to dispense with them.⁵

1 Sutton's Hospital Case, 10 Co. Rep. 30 b.; Thomas v. Dakin, 22 Wend. 994; Com. v. Westchester R. R. Co. 3 Grant Cas. 200; Goshorn v. Supervisors etc. 1 West Va. 308.

2 North Hempstead v. Hempstead, 2 Wend. 109, 133; Stebbins v. Jennings, 10 Pick. 172; Bow v. Allentown, 34 N. H. 372; Rex v. Ainery, 1 Term R. 575; and see § 16, *ante*.

3 Conservators of River Tone v. Ash, 10 Barn. & C. 349.

4 School Comm'rs v. Dean, 2 Stewt. & P. 190; Trustees etc. v. Parks, 10 Me. 441.

5 Black River etc. R. R. Co. v. Barnard, 31 Barb. 253.

§ 23. Acceptance of grant.—In the case of private corporations, it is the general rule, that the incorporating act is ineffectual to constitute a corporate body until it is accepted by the corporators.¹ And it must be accepted entire, as it is offered, if at all.² If the act depends upon conditions precedent, an acceptance strictly in conformance with the provisions of the act is necessary to render it operative, either as a grant to or obligation upon the corporation.³ A qualified or partial acceptance of an act granting new franchises to an existing corporation upon specified conditions, will not be recognized.⁴ An express or formal declaration of acceptance is not required;⁵ any unequivocal act, showing a desire and intention to accept, will be sufficient, provided it is done by a majority of the grantees.⁶ Acceptance may be implied from corporate acts;⁷ and if the parties to be benefited by the grant are found exercising the privileges granted, it will be almost conclusive evidence of the fact of acceptance.⁸ So, the acceptance of a charter amendment, like the acceptance of an original charter, may be proved by

showing that the corporation has done corporate acts, authorized by the amendment, but which without it would have been unauthorized.⁹ Acceptance of a charter may be presumed from a long lapse of time, and the continued exercise of the corporate powers;¹⁰ but the presumption of acceptance is rebutted by evidence that no proceedings were ever had under the charter, although seven years had elapsed since its date.¹¹ It is not indispensable that the vote of acceptance should appear upon the corporate records;¹² but parole evidence is inadmissible to prove acceptance, where the records can be shown.¹³ An acceptance by the directors, acquiesced in by the company, may give force and effect to an act of incorporation.¹⁴ The acceptance by a corporation of a new charter is not necessarily a surrender of the old one;¹⁵ and the corporation may act partly under both the new and the old charters, so far as they are consistent.¹⁶

1 Falconer v. Campbell, 2 McLean, 196; State v. Dawson, 16 Ind. 40; and see § 17 *ante*.

2 Rex v. Westwood, 4 Barn. & C. 781; S. C. 7 Dowl. & R. 267; Greene v. Seymour, 3 Sand. Ch. 235.

3 Lyons v. Orange etc. R. R. Co. 32 Md. 18.

4 Lyons v. Orange etc. R. R. Co. 32 Md. 18.

5 Logan v. McAllister, 2 Del. Ch. 176.

6 Russell v. McLellan, 14 Pick. 63; Rex v. Hughes, 7 Barn. & C. 708.

7 Bangor etc. R. R. Co. v. Smith, 47 Me. 34; Heath v. Silverthorn etc. Lead Co. 39 Wis. 146; Trustees of Vernon Soc. v. Hills, 6 Cowen, 23.

8 Talladega Ins. Co. v. Landers, 43 Ala. 115.

9 Smead v. Indianapolis etc. R. R. Co. 11 Ind. 104; Sumrall v. Sun Mut. Ins. Co. 40 Mo. 27; Kenton County Court v. Bank Lick Turupike Co. 10 Bush, 529; and see Goodin v. Evans, 18 Ohio St. 150.

10 Middlesex Husbandmen etc. v. Davis, 3 Met. 133.

11 Newton v. Carberry, 5 Cranch, C. C. 632.

12 Covington v. Covington etc. Bridge Co. 10 Bush, 69; Com. v. Bakeham, 105 Mass. 53.

13 Coffins v. Collins, 17 Me. 440.

14 Mut. etc. Ins. Co. v. Stokes, 9 Phil. (Pa.) 80; and see Com. v. Huston, 7 Serg. & R. 460.

15 Johnston v. Crawley, 25 Ga. 316; Norris v. Mayor etc. 1 Swan, 164.

16 Woodfork v. Union Bank, 3 Cold. 438.

§ 24. Acceptance, when not required.—The rule requiring the acceptance of charters has no application in

the case of public corporations of a municipal character.¹ Corporations of this class are absolutely created by the act of incorporation itself, without the acceptance of the people, or any act on their part, unless otherwise provided by the act.² A municipal charter may, however, be constitutionally submitted to the corporators for their acceptance before it goes into operation, and its going into effect may be made to depend on their acceptance or rejection.³ A vote of acceptance by the corporators, of the charter as tendered, is not an act of legislation.⁴ The legislature may enact a law with a provision that such law shall cease to exist unless a municipal corporation which it affects signify their assent to it within a specified period;⁵ or may enact amendments to a municipal charter, with a proviso that the electors of a village should be allowed and required to signify their acceptance of such amendments before they should take effect;⁶ or it may enact a penal law which shall have effect only in those towns, etc., which adopt it by vote.⁷ A provision in a municipal charter, that the question of the absolute prohibition of the sale of intoxicating liquors is to be submitted to a vote of the incorporators, does not invalidate the act.⁸ And a provision in such charter, by which the right to make certain improvements or to create certain liabilities is made to depend upon a vote of the people interested, has repeatedly been upheld as valid.⁹ Acceptance, when requisite, and no particular mode of acceptance is prescribed, may be implied from corporate acts and conduct, as in cases of private corporations.¹⁰ If no act of incorporation of a place can be found, its incorporation may be proved by reputation or by user, with the knowledge or assent of the legislature, for a period long enough to furnish evidence of a prescriptive right.¹¹ Where a corporation is organized under a general law, acceptance of the charter is not requisite.¹²

¹ *Gorham v. Springfield*, 21 Me. 58; *Cheaney v. Hooser*, 9 Mon. B. 334; *People v. Stout*, 23 Barb. 349; *Blaug v. Galveston*, 42 Tex. 441.

2 Berlin v. Gorham, 34 N. H. 286; Warren v. Charlestown, 2 Gray, 64, 104; Mills v. Williams, 11 Ired. 538; Brouwer v. Appleby, 1 Sand. 153; City of Clinton v. Cedar Rapids etc. R. R. Co. 24 Iowa, 456; Barnes v. District of Columbia, 91 U. S. 540.

3 Alcorn v. Horner, 38 Miss. 652; Smith v. McCarthy, 56 Pa. St. 359; People v. Salomon, 51 Ill. 53.

4 City of Paterson v. Society etc. 4 Zab. 335.

5 Corning v. Greene, 23 Barb. 33.

6 Bank of Chenango v. Brown, 26 N. Y. 467.

7 State v. Noyes, 10 Fost. 279.

8 Village of Gloversville v. Howell, 7 Hun, 345; S. C. affirmed, 70 N. Y. 287.

9 Blanding v. Burr, 13 Cal. 343; St. Louis v. Alexander, 23 Mo. 483; People v. Henshaw, 61 Barb. 403; Clarke v. Rochester, 23 N. Y. 605; Trustees v. Cherry, 8 Ohio St. 584; Burnes v. Achison, 2 Kan. 454; Hammond v. Haines, 25 Md. 541; Com. v. Judges etc. 8 Pa. St. 391.

10 Taylor v. Comm'rs of Newbern, 2 Jones' Eq. 141; and see Londonderry v. Andover, 23 Vt. 416; People v. Maynard, 15 Mich. 463.

11 Bow v. Allenstown, 34 N. H. 351; and see Jameson v. People, 16 Ill. 257.

12 Spring Valley Water Works v. San Francisco, 22 Cal. 434. See Hunt v. Kan. etc. Bridge Co. 11 Kan. 412; Hope Ins. Co. v. Beekmann, 47 Mo. 93.

§ 25. Construction of incorporating acts.—The whole act, including title and preamble, should be examined together, and one part construed by another.¹ The construction should be according to the spirit and meaning as well as the letter of the act;² and, when the language admits, so as to give effect to the general intent.³ Powers expressly granted or necessarily implied, are not to be defeated or impaired by a stringent construction.⁴ But any ambiguity or doubt arising out of the terms used by the legislature must be construed to operate in favor of the public, and against the corporation.⁵ And extraordinary authority can only be conferred upon a corporation by express words, and will not be implied.⁶ The provisions of a special act of incorporation must, in general, be construed in subordination to the general public law of the state;⁷ and, therefore, a charter provision authorizing the corporation to dispose of property "in any manner they deem best," does not operate to enable them to resort to a lottery to dispose of it, if lotteries are prohibited by the general law.⁸

So, the language of an act of incorporation must be construed in subordination to the declared purposes of the act and in accordance with all its provisions;⁹ as, where authority was conferred to take tolls for logs, etc., floated "across" the stream, this was construed to mean the descending navigation.¹⁰ Municipal corporations, like all others, are confined to a strict construction of their charters or acts of incorporation;¹¹ but general and long-continued usage may be resorted to in aid of a proper construction,¹² where the language of the enactment is not plain and the legislative intent is not clear.¹³

1 Chesapeake etc. Canal Co. v. Ohio R. R. Co. 4 Gill & J. L.

2 White v. Syracuse etc. R. R. Co. 14 Barb. 559.

3 Home of the Friendless v. Rouse, 8 Wall. 439; Turnpike Co. v. Illinois, 98 U. S. 63; Straus v. Eagle Ins. Co. 5 Ohio St. 59; Ex parte Eton College, 1 Eng. L. & Eq. 51.

4 Kyle v. Mallin, 8 Ind. 57.

5 Minturn v. Larue, 23 How. 435; Scales v. Pickering, 4 Bing. 445; Com. v. Cent. Pass. Railway, 51 Pa. St. 506; McAden v. Jenkins, 64 No. Car. 796; Wallace v. San Jose, 23 Cal. 180; Leonard v. Canton, 35 Miss. 189; Thomas v. Richmond, 12 Wall. 349; Binghamton Bridge, 3 Id. 51; Parker v. Great Western Railway Co. 7 Man. & G. 253; Stockton etc. Railway Co. v. Barrett, 7 Id. 870; 11 Clark & F. 590.

6 Gaines v. Coates, 51 Miss. 335.

7 McCartee v. Orphan Asylum Soc. 9 Cowen, 437; Hooker v. New Haven etc. Co. 15 Conn. 312; State v. Noyes, 47 Me. 189; De Lancy v. Ins. Co. 52 N. H. 581. See State v. Stoll, 17 Wall. 425.

8 State v. Krebs, 64 No. Car. 604; and see Babcock v. N. J. Stockyard Co. 20 N. J. Eq. 26; Johnson v. Griffin Banking etc. Co. 55 Ga. 631; Caldwell v. Com. Warehouse Co. 1 Hun, 718; 4 Thomp. & C. 179; Tyng v. Com. Warehouse Co. 53 N. Y. 308.

9 Morris Canal etc. Co. v. Cent. R. R. Co. 16 N. J. Eq. 419; Charles River Bridge v. Warren Bridge, 11 Peters, 420.

10 Bennett's Appeal, 65 Pa. St. 242.

11 Lafayette v. Cox, 5 Ind. 33; Collins v. Hatch, 18 Ohio, 523; Leonard v. Canton, 35 Miss. 189; Johnson v. Louisville, 11 Bush, 527; Le Couteux v. Buffalo, 33 N. Y. 333.

12 Sherwin v. Bugbee, 16 Vt. 439; Rex v. Salway, 9 Barn. & C. 424.

13 Smith v. Cheshire, 13 Gray, 318.

CHAPTER III.

CONSTITUTION AND ORGANIZATION OF
BODY CORPORATE.

- § 26. Of whom composed.
- § 27. Integral parts.
- § 28. Admission of members.
- § 29. Corporate name.
- § 30. Misnomer.
- § 31. Change of corporate name.
- § 32. Right to exclusive use of name.
- § 33. Corporate place or residence.
- § 34. Organization.

§ 26. *Of whom composed.*—A corporation, though usually composed of natural persons merely in their natural capacity, is not always thus constituted. It may also be composed of persons in their political capacity of members of other corporations.¹ A state may have an interest as one of the corporations, and it does not by such participation identify itself with the corporation;² it divests itself, so far as concerns the transactions of that corporation of its sovereign character, and takes that of a private citizen.³ So, the federal government may be a stockholder in a bank, without identifying itself with the corporation.⁴ The inhabitants of a place to be incorporated, as well as the place itself, are both indispensable to the constitution of a municipal corporation.⁵ The officers of the council and other charter officers are the mere ministers of the corporation, and are not, in themselves, the corporation.⁶

1 Sutton's Hospital Case, 10 Co. Rep. 31 c.

2 Turnpike Co. v. Wallace, 8 Watts, 316; Bank of Alabama v. Gibson, 6 Ala. 814.

3. Bank of U. S. v. Planters' Bank of Ga. 9 Wheat. 904; State Bank of So. Car. v. Gibbs, 3 McCord, 377; Seymour v. Turnpike Co. 10 Ohio, 476; Briscoe v. Commonw. of Ky. 11 Peters, 257.

4 Bank of U. S. v. McKenzie, 2 Brock. 393.

5 See Harrison v. Williams, 3 Barn. & C. 162; Reg. v. Paramore, 10 Ad. & E. 238.

6 Lowber v. Mayor, etc. 5 Abb. Pr. 325; Clarke v. City of Rochester, 24 Barb. 446; 28 N. Y. 605.

§ 27. **Integral parts.**—Some corporations aggregate consist of distinct parts, called integral parts, without any one of which the corporation would be incomplete; as, where a church corporation consisted of three clerical, and eight lay members, it was deemed by the Court to be a corporation composed of two distinct classes, or integral parts.¹ A corporation cannot be considered as composed of distinct, definite, integral parts, unless the number of the members of each class is definite, and a majority of the members of each is necessary to constitute a corporate meeting, or assembly.²

¹ St. Mary's Church, 7 Serg. & R. 517. See People v. Twaddell, 18 Hun, 427, 432.

² Regents of University v. Williams, 9 Gill & J. 365; and see Rex v. Miller, 6 Term Rep. 268; Machell v. Nevins, 11 East, 84 n.

§ 28. **Admission of members.**—The power to admit new members is incident to every corporation aggregate, and need not be expressly conferred.¹ When the charter is silent as to the matter, recourse must be had to the rules of the common law, and to the particular nature and purpose of the corporation.² In certain corporations the number of members is sometimes limited by charter, and, in case of a vacancy, it is filled by a vote of the company.³ In the case of all corporations having a capital stock, and looking to profits, such as trading and joint-stock companies, membership is constituted by a transfer of shares, according to the by-laws, without any election on the part of the corporation itself.⁴ An individual insured in a mutual insurance company becomes a member of the corporation by that act.⁵ A right as a corporator in a religious society is obtained by stated attendance on divine worship, and contributing to its support by renting a pew, or by some other mode usual in the congrega-

tion.⁶ And members of a religious society are not required to be residents of the town in which it is organized.⁷ No person can be made or become a member of a parochial incorporation without his consent, nor can any person thrust himself into any such body against its will.⁸ But where the legislature incorporated certain persons, "with their families," into a religious society, the minors, as members of the father's family, thus became members of the corporation, and so continued after attaining full age.⁹ Provisions in the charter, that the members of a corporation shall be elected annually, are only directory, and the corporation may elect after the annual day has, by means free from design or fraud, been passed by.¹⁰ But where the charter vests the admission of members in the body at large, a power vested in the directors, to provide for the admission of members, gives them only a right to prescribe in their by-laws the time, place, and manner of holding the election of members, and not the right to pass a by-law imposing a test of membership not contemplated by the charter.¹¹ A mistake in registering the name,¹² or the address,¹³ of a member, can in no degree affect the question of his membership.

1 1 Bl. Com. 467, 468; *Dartmouth College v. Woodward*, 4 Wheat. 518, 634.

2 See *Spaulding v. Lowell*, 23 Pick. 71; *Aurora v. West*, 9 Ind. 74.

3 See *Diligent Fire Co. v. Commonw.* 75 Pa. St. 91.

4 *Overseers of Poor v. Sears*, 22 Pick. 122; *Agricultural Bank v. Burr*, 24 Me. 256; and see *State v. Ferris*, 42 Conn. 560.

5 *Mitchell v. Lycoming Mut. Ins. Co.* 51 Pa. St. 402; *Sullivan v. Mass. Mut. Fire Ins. Co.* 2 Mass. 218; and see *Georgia etc. Life Ins. Co. v. Gibson*, 52 Ga. 640.

6 *Cammeyer v. United German Luth. Churches*, 2 Sand. Ch. 186; *People v. Tutnill*, 81 N. Y. 550.

7 *Cong. Soc. v. Swan*, 2 Vt. 223.

8 *First Parish in Sudbury v. Stearns*, 21 Pick. 148. See *Keith v. Howard*, 24 Id. 232.

9 *Bradford v. Cary*, 5 Me. 339.

10 *State v. Young*, 51 Ill. 149.

11 *Commonw. v. Gill*, 3 Whart. 228.

12 *Clowes v. Brettell*, 11 Mees. & W. 461; *Yelland's Case*, 5 De Gex & S. 345.

13 *Wills v. Murray*, 4 Ex. 843.

§ 29. **Corporate name.**—A corporation is required to have a name;¹ and when such name has been duly given by statute, or adopted as required by a general statute, the corporation can act by no other name.² If no name be expressly given to a corporation, it may obtain one by implication;³ and a corporation may acquire a name by usage or reputation.⁴ Where a corporation exists by prescription, it may have several names;⁵ but a corporation created by charter can have but one name, at the same time, and for the same purpose.⁶

1 Case of Sutton's Hospital, 10 Code R. 23 a.

2 Glass v. Tipton etc. Turnpike Co. 32 Ind. 376.

3 Anon. Salk. 191.

4 Smith v. Plank Road Co. 30 Ala. 650; School District v. Blakeslee, 13 Conn. 237.

5 Knight v. Mayor, etc. 1 Ld. Raym. 80; and see Dutchess Cotton Manuf. Co. v. Davis, 14 Johns. 238; All Saints Church v. Lovett, 1 Hall, 191; Hammond v. Shepard, 23 How. Pr. 133.

6 Physicians v. Salmon, 3 Salk. 102. See Minot v. Curtis, 7 Mass. 441; Conro v. Port Henry Iron Co. 12 Barb. 27.

§ 30. **Misnomer.**—In order to sustain grants to, or by, corporations, some latitude is permitted in the use of the corporate name, and the rule in such cases is, that the name must be the same in substance, but need not be the same in words and syllables.¹ A legacy may be given to a corporation either by its corporate name or by description, if in the latter case the corporation is so defined as to be distinguished from every other.² A contract is not avoided by the misnaming therein of the corporation with which it is made;³ and a latent ambiguity may, under proper averments, be explained by parol evidence, in this as in other cases, to show the intention.⁴ If a corporation be misnamed in a statute, but there is enough from which to ascertain what corporation is meant, the statute is not thereby rendered inoperative.⁵ So, a misnomer of the corporation in a public notice to subscribers to pay installments is immaterial in an action by the corporation to recover the installment.⁶ Transposition of the words comprising the name is not always important, if it be evi-

dent what corporation is intended; ⁷ and mere matter of addition does not amount to a misnomer. ⁸ Greater accuracy as to the name of the corporation is required in legal proceedings, and the true corporate name should be used both in suits by and against the corporation. ⁹ But a slight variation from the true name will be disregarded, unless the misnomer be taken advantage of by plea in abatement. ¹⁰ And if a corporation, sued by an erroneous name, appears by that name and without objecting, the error is cured. ¹¹ If a deed, ¹² or a note, bond, or other promise be made to a corporation, by a name varying from the corporate one, ¹³ the corporation may sue in its true name, and allege that the defendant made the deed, etc., to them by the name mentioned in the instrument. ¹⁴ A writ of mandamus addressed to a corporation, otherwise than by its true name, is void; ¹⁵ so, an error in the name in an execution is a material variance and fatal; ¹⁶ so of an error in the name in a judgment against a corporation. ¹⁷ And accuracy is especially required in stating the name of a corporation in all criminal proceedings in which they are concerned. ¹⁸

1 *Rex v. Haughley*, 4 Barn. & Adol. 650; *Glass v. Tipton etc. Co.* 32 Ind. 376; *Kentucky Seminary v. Wallace*, 15 B. Mon. 35; *Douglass v. Branch Bank*, 19 Ala. 659; *Northumberland Bank v. Ayer*, 60 Pa. St. 436; *People v. Bunkie*, 9 Johns. 147; *St. Louis Hospital v. Williams*, 19 Mo. 609.

2 *Institution for the Blind v. How*, 10 N. Y. 84; and see *Minot v. Boston Asylum etc.* 7 Met. 416; *Preachers' Aid Soc. v. Rich*, 45 Me. 532; *Chapin v. School District etc.* 35 N. H. 445; *Burdine v. Grand Lodge of Ala.* 37 Ala. 478; *Bridgeport v. Hall*, 18 La. An. 211; *Van Sante v. Roberts*, 3 Md. 119.

3 *Building Assoc. v. Martin*, 2 Beasl. 427.

4 *Berks etc. Turnpike Co. v. Myers*, 6 Serg. & R. 12; *Milford etc. Turnpike Co. v. Brush*, 10 Ohio, 111.

5 *Chancellor of Oxford's Case*, 10 Co. Rep. 44, 57 b.

6 *Gray v. Monongahela Navigation Co.* 2 Watts & S. 156; and see *Eastham v. Blackburn Railw. Co.* 25 Eng. L. & Eq. 498.

7 *Chadsey v. McCrary*, 27 Ill. 253.

8 *Meltor v. Spateman*, 1 Saund. 340 a; and see *Dumper v. Syms*, Cro. Eilz. 815.

9 *Romeo v. Chapman*, 2 Mich. 179; *Cambridge University v. Crofts*, 10 Mod. 293; *Clark v. Potter County*, 1 Pa. St. 163; *Brittain v. Newland*, 3 Dev. & B. 363; *Insane Asylum v. Higgins*, 15 Ill. 165.

10 *Burnham v. Strafford County Sav. Bank*, 5 N. H. 446; *Hoereth v. Franklin Mill Co.* 30 Ill. 151; *Thatcher v. West River National Bank*, 19 Mich. 156; and see *Coulter v. Trustees etc.* 29 Md. 69.

11 *Virginia etc. Steam Nav. Co. v. United States*, Taney, 418.

12 *Northwestern Distilling Co. v. Brant*, 69 Ill. 658.

13 *Fort Wayne v. Jackson*, 7 Blackf. 36; *African Soc. v. Varick*, 13 Johns. 33; *Trustees v. Reneau*, 2 Swan, 94.

14 *Northwestern Distilling Co. v. Brant*, 69 Ill. 658.

15 *Rex v. Morris*, 2 Ld. Raym. 1238.

16 *Bradford v. Water Lot Co.* 58 Ga. 280.

17 *Britton v. Gradon*, 1 Ld. Raym. 117. But see *Healings v. Mayor etc. Cro. Car.* 574; *Sherman v. Proprietors etc.* 11 Mass. 333.

18 *Reg. v. West*, 2 Eng. Railw. C. 613; *Rex v. Patrick*, 1 Leach Cr. Cas. 253. But see *People v. Potter*, 35 Cal. 110.

§ 31. Change of corporate name.—Where a name is given in the act of incorporation, this cannot be changed by the act of the corporate body.¹ The corporate name can be changed only by the same power by which the corporate body has been created.² It is effected by changing the articles of incorporation, and the best evidence of the change is the articles themselves; parol evidence is not primarily admissible.³ The identity of a corporation is not necessarily destroyed by a change of its name;⁴ and a mere change of name by the legislature, without altering the corporate powers, does not affect third persons, provided the identity of the corporation be shown.⁵

1 *Shackleford v. Dangerfield*, Law R. 3 C. P. 307.

2 *Reg. v. Register etc.* 10 Q. B. 389; and see *Morris v. St. Paul etc. R. R. Co.* 19 Minn. 523.

3 *Chicago etc. R. R. Co. v. Kiesel*, 43 Iowa, 39.

4 *Girard v. Philadelphia*, 7 Wall. 1. See *Episcopal etc. Soc. v. Episcopal Church etc.* 1 Pick. 372; *Wardens etc. v. Hall*, 22 Conn. 125; *Cahill v. Bigger*, 8 B. Mon. 211; *Water Lot Co. v. Bank of Brunswick*, 53 Ga. 30.

5 *Rosenthal v. Madison etc. Road Co.* 10 Ind. 358. And see *Dean v. La Motte Lead Co.* 59 Mo. 523; *Wallace v. Loomis*, 97 U. S. 146.

§ 32. Right to exclusive use of name.—A corporate name is a necessary element of the existence of a corporation, and the right to its exclusive use will be protected to the same extent, and upon the same principles, that individuals are protected in the use of trade marks.¹

And courts of equity may afford relief in such cases, on the ground of the injury to the party aggrieved, and the imposition upon the public, independent of the question whether there is any fraud or evil intent.² But an injunction will not lie at the suit of a corporation, to restrain persons from adopting and using the same corporate name, if the complainant has a remedy at law.³

¹ *Newby v. Oregon etc. R. R. Co.* Deady, 609. And see *Ex parte Walker*, 1 Tenn. Ch. 97.

² *Holmes v. Holmes etc. Manuf. Co.* 37 Conn. 278.

³ *London etc. Soc. v. London etc. Ins. Co.* 11 Jur. 938.

§ 33. **Corporate place or residence.**—The place of residence of a corporation is the place where its principal office is located, or where its principal operations are carried on;¹ where the profits come home to the members, whence orders emanate, and where the chief officers are to be found.² In legal contemplation, a railroad corporation resides in the counties through which its road passes, and in which it transacts its business;³ or in the county or town upon the line of its road where its principal office and the center of its business operations are situated.⁴ A private corporation is a resident, subject, or citizen of the state in which it is created, irrespective of the residence of its members.⁵ It can have no legal existence beyond the boundaries of that state, but must dwell there, and cannot migrate to another sovereignty.⁶ But it may act and contract and carry on business by a duly constituted agent, in another state or sovereignty, having a regard to the laws of such other state.⁷ This right to carry on business, etc., in another state, is based upon the comity between the states, and is a voluntary act of the sovereign power;⁸ when contrary to good policy, or when prejudicial to the interests of the state, the comity ceases to be obligatory.⁹ Corporations have no *status* in states, as citizens of the state creating them.¹⁰ They are creatures of local law, and have not even an absolute right of recognition in other states, but depend for that and for

the enforcement of their contracts upon the assent of such states, which may be given on such terms as the states may respectively prescribe.¹¹ But the right to prescribe terms, or impose conditions, will not authorize the exclusion or regulation of foreign corporations engaged in interstate commerce.¹² And a corporation which has a legal existence in any one state can sue in the federal courts of any other state.¹³ Foreign corporations, including those created by foreign governments, are allowed by the comity of states to come into the District of Columbia, open offices for the transaction of business, and make contracts upon which they may sue or be sued in the courts of the district, provided the contract is made there, and all the circumstances attending its alleged violation occur there.¹⁴ A corporation chartered by two states, having property in both, will be treated as a domestic corporation by each state to the extent of its property in that state, and as a foreign corporation with respect to the property out of the state.¹⁵ The word "resident" in statutes relative to remedies, taxation, etc., generally includes corporations created by and carrying on business within the State.¹⁶

1 *Hubbard v. Nat. etc. Ins. Co.* 11 How. Fr. 149; *Glaise v. So. Car. R. R. Co.* 1 Strob. 70; *Thorn v. Cent. R. R. Co.* 2 Dutch. 121.

2 *Adams v. Great Western Railw. Co.* 6 Hurl. & N. 404; and see *Land Grant Railw. Co. v. Coffey Co.* 6 Kan. 245.

3 *Richardson v. Burlington etc. R. R. Co.* 8 Clarke, 260; *Toledo etc. R. R. Co. v. Milligan*, 52 Ind. 505; and see *Buffalo etc. R. R. Co. v. Supervisors etc.* 43 N. Y. 93.

4 *Conn. etc. R. R. Co. v. Cooper*, 30 Vt. 476; and see *Androscoggin etc. R. R. Co. v. Stevens*, 23 Me. 434; *Southwestern R. R. Co. v. Paulk*, 24 Ga. 356.

5 *St. Louis v. Wiggin's Ferry Co.* 40 Mo. 58.

6 *Bank of Augusta v. Earle*, 13 Peters, 519; *Farnum v. Blackstone Canal Co.* 1 Sumn. 47; *Camp v. Byrne*, 41 Mo. 525; *Matthews v. Theolog. Seminary*, 2 Brewst. 641; *Evaus v. Monot*, 4 Jones Eq. 231; *New Orleans etc. R. R. Co. v. Wallace*, 50 Miss. 244; *Gill v. Ky. etc. Min. Co.* 7 Bush, 635; *Lathrop v. Union Pacific Railw. Co.* 1 McAr. 234.

7 *Day v. Newark India Rubber Co.* 1 Blackf. 623; *Ohio etc. R. R. Co. v. Wheeler*, 1 Black. 236; *Wright v. Bensly*, 11 Ind. 398; *Ormsby v. Vt. Copper etc. Co.* 53 N. Y. 623; *Hadley v. Freedman's Savings etc. Co.* 2 Tenn. Ch. 123.

8 *Newburg Petroleum Co. v. Weare*, 27 Ohio St. 343; *Baltimore etc. R. R. Co. v. Glenn*, 28 Md. 287; *Williams v. Creswell*, 51 Miss. 617.

9 *Paul v. Virginia*, 8 Wall. 168; *Smith v. Alvord*, 63 Barb. 415; *Second Nat. Bank v. Lovell*, 2 Cin. (Ohio) 397; *Carroll v. City of East St. Louis*, 67 Ill. 568; *Ducat v. Chicago*, 48 Id. 172; *Merrick v. Van Santvoord*, 34 N. Y. 208, 217; *Doyle v. Continental Ins. Co.* 94 U. S. 535. See *Hartford Fire Ins. Co. v. Doyle*, 6 Biss. 461.

10 *Myers v. Manhattan Bank*, 20 Ohio, 283; *Ducat v. Chicago*, 48 Ill. 172.

11 *West. Union Tel. Co. v. Mayer*, 28 Ohio St. 521; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566; *Lamb v. Lamb*, 13 Bank. Reg. 17; *Home Ins. Co. v. Davis*, 2 Mich. 233; *Farmers etc. Ins. Co. v. Harrah*, 47 Ind. 236; *Insurance Co. v. Morse*, 20 Wall. 445; *Doyle v. Continental Ins. Co.* 94 U. S. 535; *Indiana v. Am. Express Co.* 7 Biss. 230; *State v. Fosdick*, 21 La. An. 474; *Slaughter v. Commonw.* 13 Gratt. 767; *Northwest Ins. Co. v. Overholt*, 4 Dill. 287; *Millor v. N. Y. etc. R. R. Co.* 53 N. Y. 363; *County of Alleghany v. Cleveland etc. R. R. Co.* 51 Pa. St. 228; *Bellows v. Todd*, 39 Iowa, 209; *Phoenix Ins. Co. v. Commonw.* 5 Bush, 68; *Wood Mowing Machine Co. v. Caldwell*, 54 Ind. 270.

12 *Pensacola Tel. Co. v. West. Union Tel. Co.* 96 U. S. 11, 13; and see *Reading R. R. Co. v. Pennsylvania*, 15 Wall. 232; *City of Council Bluffs v. Kansas etc. R. R. Co.* 45 Iowa, 338; *Almy v. State of California*, 24 How. 169; *State v. Carrigan*, 39 N. J. L. 35. But see *Am. Union Ex. Co. v. St. Joseph*, 66 Mo. 675.

13 *Nat. Park Bank v. Nichols*, 4 Biss. 315; *Ex parte Schollenberger*, 96 U. S. 369; *Railway Co. v. Whiton*, 13 Wall. 270. See *Pomeroy v. N. Y. etc. R. R. Co.* 6 Blatchf. 105; *Myers v. Dorr*, 13 Id. 22; *McCoy v. Washington County*, 3 Wall. Jr. 381; *West. Union Tel. Co. v. Dickinson*, 40 Ind. 444; 13 Am. Law Reg. 295.

14 *Weymouth v. Washington etc. R. R. Co.* 1 McAr. 19; and see *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566.

15 *State v. Northern Cent. Railw. Co.* 18 Md. 183. See *Ohio etc. R. R. Co. v. Wheeler*, 1 Black, 286; *Sprague v. Hartford etc. R. R. Co.* 5 R. I. 235.

16 *Louisville etc. R. R. Co. v. Letson*, 2 How. 497; *N. Y. etc. R. R. Co. v. Shepard*, 5 McLean, 455; and see *Bank of Ga. v. Gibson*, 11 Ga. 453. Compare *Sherwood v. Buffalo etc. R. R. Co.* 12 How. Pr. 136.

§ 34. **Organization.**—The life of a corporation dates from its organization, and not from the time it begins to do business.¹ And the words “organize” and “organization” mean the election of officers constituting the body complete for the transaction of its business.² Provisions of a charter, relative to the steps to be taken to organize, should receive a liberal interpretation.³ If all the requirements of the charter are observed, though not in the order prescribed, the organization is sufficient.⁴ The production of the corporate books, showing the election of officers, is, *prima facie*, sufficient to show a compliance with statutory prerequisites, and that the corporation has an existence.⁵ If a company has been in operation unquestioned for several years, due organization is presumed.⁶ The regularity

of the proceedings taken to organize a corporation cannot be questioned collaterally;⁷ as by way of defense to an action by a railroad company to recover an unpaid balance of subscription to the capital stock;⁸ or by way of defense to proceedings instituted by the company to acquire lands for its road;⁹ or upon a bill to enjoin the company from constructing its road.¹⁰ And the legislature has power to cure any defect in the organization of a corporation formed under a general act.¹¹ Where a corporation is formed, or attempted to be formed, under a general law which provides that, before such corporate body shall commence business, a certificate of the purposes of the organization shall be filed in certain public offices, such filing is a necessary prerequisite to relieving the corporators from individual liability.¹²

1 *Hanna v. International Petroleum Co.* 23 Ohio St. 622. Compare *Vt. Cent. R. R. Co. v. Claves*, 21 Vt. 30; *Stoops v. Greensburg etc.*, Plank Road Co. 10 Ind. 47; *Brouwer v. Appleby*, 1 Sand. 158.

2 *New Haven etc. R. R. Co. v. Chapman*, 38 Conn. 56.

3 *Judah v. American etc. Ins. Co.* 4 Ind. 333.

4 *Eakright v. Logansport etc. R. R. Co.* 13 Ind. 404. Compare *Miller v. Wild Cat Gravel Road Co.* 57 Id. 241.

5 *Ryder v. Alton etc. R. R. Co.* 13 Ill. 516.

6 *Agricultural Bank v. Burr*, 24 Me. 256; and see *Bank of U. S. v. Lyman*, 1 Blatchf. 297; 20 Vt. 666; *Stockton etc. Gravel Road Co. v. Stockton etc. R. R.* 45 Cal. 630.

7 *Doyle v. Peerless Petroleum Co.* 44 Barb. 239; *Aurora etc. R. R. Co. v. Miller*, 56 Ind. 88; *Daunenbroge Min. Co. v. Barrett*, 26 Cal. 286; § 21 *ante*.

8 *Swartwout v. Mich. etc. R. R. Co.* 24 Mich. 389.

9 *Aurora etc. R. R. Co. v. Miller*, 56 Ind. 88.

10 *Aurora etc. R. R. Co. v. Lawrenceburg*, 53 Ind. 80.

11 *Goodrich v. Reynold*, 31 Ill. 450; *Syracuse City Bank v. Davis*, 16 Barb. 188; *Kanawha Coal Co. v. Kanawha etc. Coal Co.* 7 Blatchf. 391; *St. Louis R. R. Co. v. Northwestern St. Louis Railw. Co.* 2 Mo. App. 69. See *Blanchard v. Kaull*, 44 Cal. 440.

12 *Bigelow v. Gregory*, 73 Ill. 197; and see *Indianapolis etc. Mining Co. v. Herkimer*, 46 Ind. 142; *Abbott v. Omaha Smelting etc. Co.* 4 Neb. 416. *Contra*, *Harrod v. Hamer*, 32 Wis. 162; *Childs v. Smith*, 46 N. Y. 34, reversing 55 Barb. 45; *First Nat. Bank v. Davies*, 43 Iowa, 424. The expression "constating instruments," has been employed to signify the document or collection of documents which fix the constitution of any corporation: see *Green's Brice's Ultra Vires*, 26, 27.

CHAPTER IV.

CORPORATE POWERS.

- § 35. Whence derived.
- § 36. Construction of powers.
- § 37. Common-law powers.
- § 38. Resumption of granted powers.
- § 39. Mode of exercising powers.
- § 40. Powers in respect of property.
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- § 42. Presumptions in favor of title.
- § 43. Powers in respect to contracts.
- § 44. Mode of contracting.
- § 45. Principles of construction.
- § 46. Capacity to sue.
- § 47. Name in which to sue.
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- § 49. Disfranchisement of members.
- § 50. Corporate seal.
- § 51. Power to hold property in trust.
- § 52. Bequests to corporations.
- § 53. Devise to corporation.
- § 54. Deeds by corporations.

§ 35. Whence derived.—Corporations have none of the elements of sovereignty,¹ and can have and exercise only such powers as are expressly conferred on them by the act of incorporation, and such implied powers as are necessary to enable them to perform their prescribed duties.² A corporation is confined strictly to the sphere of action limited by the terms and intention of the charter;³ and no vote or act of the corporation can enlarge its chartered authority, either as to the subjects on which it is intended to operate, or the persons or property of the corporators.⁴ The legislature of a state may confer exclusive franchises upon corporations, unless restricted by the constitution.⁵ And without the assent or authority of the

legislature, the franchise of a corporation cannot be levied upon and sold under execution, in payment of the corporate debts.⁶ But, in this country, no franchise can be held which does not emanate from the government or sovereign power.⁷ A franchise consists of the entire privileges embraced in the grant, but does not embrace property acquired by the exercise of the franchise as at first granted.⁸

1 *St. Louis v. Weber*, 44 Mo. 547.

2 *Smith v. Morse*, 2 Cal. 524; *Vandall v. South San Francisco Dock Co.* 40 Cal. 84; *Russell v. Topping*, 5 McLean, 1-4; *City Council v. Plank Road Co.* 31 Ala. 76; *Commonw. v. Erie etc. R. R. Co.* 27 Pa. St. 339; *Matthews v. Skinner*, 62 Mo. 329; *Bellmeyer v. Ind. Distr. of Marshalltown*, 44 Iowa, 564; *Weekler v. First Nat. Bank*, 42 Md. 581; *Bowling Green R. R. v. Warren County Court*, 10 Bush, 712; *Downing v. Mt. Washington Road Co.* 40 N. H. 241; *White's Bank v. Toledo Ins. Co.* 12 Ohio St. 501; *LeConteulx v. City of Buffalo*, 33 N. Y. 343; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 666; *Turnpike Co. v. Illinois*, 96 id. 63; *Thomas v. Railroad*, 101 id. 71; *Salomons v. Lalug*, 12 Beav. 339; *Nat. Manure Co. v. Donald*, 28 Law J. Ex. 185; *South Yorkshire etc. Co. v. Great North. Railw. Co.* 9 Ex. 55; *Eastern Counties Railw. v. Hawkes*, 5 H. L. Cas. 348.

3 *Utica Ins. Co. v. Scott*, 19 Johns. 1; *State v. Washington Library Co.* 11 Ohio, 96; *Broughton v. Manchester Water Works Co.* 3 Barn. & Ald. 1; *Dublin Corp. v. Att.-Gen.* 9 Bligh N. S. 395.

4 *Salem Mill Dam Co. v. Ropes*, 6 Pick. 23.

5 *Piscataqua Bridge Co. v. N. H. Bridge Co.* 7 N. H. 35; *California State Tel. Co. v. Alta Tel. Co.* 22 Cal. 398; *Truckee etc. Road Co. v. Campbell*, 44 id. 89; *Atlantic etc. R. R. Co. v. Allen*, 15 Fla. 637.

6 *Randolph v. Larned*, 27 N. J. Eq. 557; *Stewart v. Jones*, 40 Mo. 140; and see *Arthur v. Com. etc. Bank*, 9 Ames & M. 394; *Foster v. Fowler*, 60 Pa. St. 27; *Gibbs v. Drew*, 16 Fla. 147; 26 Am. Rep. 700.

7 *Bank of Augusta v. Earle*, 13 Peters, 519; *People v. Utica Ins. Co.* 15 Johns. 387; *Commonw. v. Arrison*, 15 Serg. & R. 130; *Chicago City Railw. Co. v. People*, 73 Ill. 541; *State v. Burlington etc. R. R. Co.* 26 Vt. 433.

8 *Bridgeport v. N. J. etc. R. R. Co.* 36 Conn. 255. See *Evangelical etc. Home v. Buffalo Hydraulic Assoc.* 64 N. Y. 561.

§ 36. Construction of powers. — Extraordinary powers will not be implied;¹ and an express grant of extraordinary powers which contravene established rights must be construed with reasonable strictness.² Such a grant is not to be construed to carry as an incident anything not implied in the principal, nor usually appurtenant to it, and not possessed of a similar character.³ Any ambiguity or doubt arising out of the terms used by the legislature, must be resolved in favor of the public.⁴ The specific grant of certain powers in a charter is an implied

prohibition of other and distinct powers.⁵ And restrictions imposed by statute upon the exercise of corporate powers may be construed without reference to whether the powers are inherent, or conferred by express law; in either case, an act done outside the limits imposed, or an authorized act done by a method prohibited, will be void.⁶ Provisions of statute authorizing companies to levy any charge upon the public, must be construed strictly.⁷ So, of statute provisions which confer power to take private property for public use.⁸ A mere power conferred by charter on a corporation, does not imply a duty to perform the act, nor render the corporation liable in damages for nonperformance.⁹ But where the power is conferred to be exercised for the public good, the exercise of the power is not merely discretionary, but imperative, and the words "power and authority," in such case, may be construed "duty and obligation."¹⁰ So, words of permission, if tending to promote the public benefit, are obligatory.¹¹ The legislature cannot confer upon a corporation privileges or exemptions which it cannot constitutionally confer upon a private person; as for instance, the privilege of charging a greater rate of interest than the general laws allow.¹² Authority to a corporation to carry on a stockyard does not empower it to carry on the business in a way that would be injurious to others.¹³ A provision in an act of incorporation inconsistent with the individual irresponsibility of the members for debts of the corporation, being in derogation of the common law, must be strictly construed.¹⁴ And an act creating a corporation, conferring upon it the powers and privileges of another corporation formerly created, by reference, without setting them forth, should be construed strictly against the corporation, where the rights of others are affected.¹⁵

1 *Gainess v. Coates*, 51 Miss. 335.

2 *Greenwich v. Easton etc. R. R. Co.* 24 N. J. Eq. 217.

3 *Beaty v. Knowler*, 4 Peters, 152; *Harris v. Intendant*, 23 Ala. 577.

4 *Minturn v. Larue*, 23 How. 435; *Home of the Friendless v. Bouse*, 8 Wall. 430; *Penn'a Railw. Co. v. Canal Comm'rs*, 21 Pa. St. 22.

5 *N. Y. etc. Ins. Co. v. Ely*, 5 Conn. 560, 572; *People v. Utica Ins. Co. 18 Johns. 35*; *Morris etc. R. R. Co. v. Sussex R. R. Co.* 30 N. J. Eq. 542; and see *Halstead v. Mayor etc. of N. Y.* 3 N. Y. 430.

6 *Farmers' etc. Bank v. Harrison*, 57 Mo. 503.

7 *Stockton etc. Railw. Co. v. Barrett*, 11 Clark & F. 590; 7 Man. & G. 870.

8 *Currier v. Marietta etc. R. R. Co.* 11 Ohio St. 223.

9 *Lancaster Canal Co. v. Parmaby*, 11 Ad. & E. 223; 1 Eng. Railw. Cas. 656.

10 *Comm'rs etc. v. Duckett*, 20 Md. 468; *Comm'rs v. Alleghany*, 20 Id. 449; *Reg. v. Bristol Dock Co.* 2 Eng. Railw. Cas. 569. Compare *Goodrich v. Chicago*, 20 Ill. 445.

11 *Bex v. Mayor etc. of Hastings*, 1 Dowl. & R. 148.

12 *Gordon v. Winchester Bull. Assoc.* 12 Bush, 110; and see *Johnson v. Griffin Banking etc. Co.* 55 Ga. 631.

13 *Babcock v. N. J. Stock-yard Co.* N. J. Eq. 296; and see *Hooker v. New Haven etc. Co.* 15 Conn. 312.

14 *Moyer v. Penn'a State Co.* 71 Pa. St. 293.

15 *Bowling Green R. R. Co. v. Warren County Court*, 10 Bush, 711.

§ 37. Common-law powers.—The common law annexes to a corporation, when created, certain incidents and powers which, without any express provision, are deemed to be inseparable from every corporation.¹ These are: 1. To have perpetual succession, and, of course, the power of electing members in the room of those removed by death or otherwise; 2. To sue and be sued, and to grant and receive by their corporate name; 3. To purchase and hold lands and chattels; 4. To have a common seal; 5. To make by-laws for the government of the corporation; 6. The power of motion, or removal of members.² Powers, incident at common law, are restricted by the nature and object of the institution of each corporate body.³ No powers will be implied, except those only which are incidental to the very existence of the corporation, or so necessary to the enjoyment of some special grant, that without the implied power, such right would fail.⁴ But it is an established principle, that corporations may exercise all the powers within the fair intent and purpose of their creation, which are reasonably proper to give effect to powers expressly granted.⁵ Dealings of a corporation,

which, on their face, or according to their apparent import, are within its power, are not to be regarded as illegal or unauthorized, without some evidence to show that they are of such a character;⁶ they are, in general, subject to the same presumptions as the acts and dealings of private persons;⁷ and a corporation is entitled to the benefit of the rule which imputes innocence rather than wrongs to the conduct of men.⁸

1 See *Rochester Ins. Co. v. Martin*, 13 Minn. 59; *White's Bank v. Toledo Ins. Co.* 12 Ohio St. 601; *Downing v. Mt. Washington etc. Co.* 40 N. H. 230.

2 2 Kent Com. 277; and see *Penobscot Boom Co. v. Lamson*, 16 Me. 24; *Sherwood v. Am. Bible Soc.* 4 Abb. Ct. App. 227.

3 *Barry v. Merchants' Ex. Co.* 1 Sand. Ch. 280; *Buffet v. Troy etc. R. R. Co.* 40 N. Y. 108, 176; *Hood v. N. Y. etc. R. R. Co.* 22 Conn. 1.

4 *Gaines v. Coates*, 51 Miss. 335; *Tennessee etc. R. R. Co. v. Adams*, 3 Head, 5 6; *Linton v. Sharpsburg Bridge*, 1 Grant Cas. 414; *Wellerburg etc. Plank Road Co. v. Young*, 12 Md. 476.

5 *Bridgeport v. Railroad Co.* 15 Conn. 475.

6 *St. Louis v. Weber*, 44 Mo. 547; *Dana v. Bank of St. Paul*, 4 Minn. 385; *McDaniels v. Flower Brook Manuf. Co.* 23 Vt. 274.

7 *Commonw. v. Cullen*, 13 Pa. St. 133; *Bank of U. S. v. Dandridge*, 12 Wheat. 64; *Morris etc. R. R. Co. v. Sussex R. R. Co.* 20 N. J. Eq. 542; *Union Water Co. v. Murphy's Flat Flume Co.* 23 Cal. 620; *Eastern Counties Railw. Co. v. Hawkes*, 5 H. L. Cas. 381; *Shrewsbury etc. Railw. Co. v. Northwest. Railw. Co.* 6 Id. 113. See *infra*, ULTRA VIRES.

8 *Chautauque County Bank v. Risley*, 19 N. Y. 369; *DeGross v. Am. Linen Thread Co.* 21 Id. 124.

§ 38. Resumption of granted powers.—The character of a private corporation which contains no power of repeal, and which has been accepted by the corporators, is a contract between the state and the corporation, as to the franchises granted;¹ and the legislature has no power to summarily repeal the charter, or otherwise impair the obligation of such contract, without the consent of the corporators, the other party thereto.² But when the charter itself, or the constitution, or a law of the state, provides that the charter is subject to repeal by the legislature, at its pleasure, without restrictions or conditions limiting the power of repeal, the legislature has the right to exercise its power summarily and at will.³ Legislation to repeal or alter a charter must, however, be express, or

such as to raise a necessary implication.⁴ As it respects public or municipal corporations, the legislature, as the trustee or guardian of the public interest, has supreme power over them, unless constitutionally restrained.⁵ It may modify their franchises, increase or diminish their corporate powers, amend their charters, enlarge or reduce their privileges, or annul their corporate existence, as, in its judgment, the general good requires, and irrespective of either consent or objection on the part of the people of the municipality;⁶ subject to the limitation, that, as regards property rights and matters of exclusively local concern, it has no right to control the action of the municipal body by compulsory legislation.⁷

1 *Dartmouth College v. Woodward*, 4 Wheat. 518; *Allen v. McKeen*, 1 Sum. 276; *Hartford Bridge Co. v. Union Ferry Co.*, 20 Conn. 210; *State v. Heyward*, 3 Rich. 380; *Bank of State v. Bank of Cape Fear*, 13 Ired. 75.

2 *Flint etc. Plank Road Co. v. Woodhull*, 25 Mich. 99; *Mowrey v. Indianapolis etc. R. R. Co.*, 4 Biss. 73; *Allen v. Buchanan*, 9 Phila. (Pa.) 283; *Central Bridge v. Lowell*, 15 Gray, 106; *State v. Noyes*, 47 Me. 191; *State v. Accommodation Bank*, 24 La. An. 238; *Bank of Dominion v. McVeigh*, 20 Gratt. 437.

3 *Lothrop v. Stedman*, 13 Blatchf. 134; 42 Conn. 583; and see *Sala v. New Orleans*, 2 Wood. 188; *State v. Commissioner etc.*, 3 N. J. L. 228; *West Wisconsin R. R. Co.*, 35 Wis. 257; *Tomlinson v. Branch*, 15 Wall. 460; *New Jersey v. Yard*, 95 U. S. 104; *State v. Maine Cent. R. R. Co.*, 68 Me. 488; *Robinson v. Gardiner*, 28 Gratt. 509; *Joslyn v. Pacif. Mail Steamship Co.*, 12 Abb. Pr. N. S. 323.

4 *Webb v. Ridgely*, 33 Md. 364; *Freehold etc. Assoc. v. Brown*, 29 N. J. Eq. 111.

5 *McKim v. Odom*, 3 Bland, 407; *Martin v. Dix*, 52 Miss. 53; *Faterson v. Soc. for Manuf.*, 4 Zab. 385; *Berlin v. Gorham*, 34 N. H. 266; *Vance v. Little Rock*, 30 Ark. 435.

6 *Rader v. Southeasterly Road District etc.*, 36 N. J. L. 273; *People v. Common Council of Chicago*, 51 Ill. 53; *San Francisco v. Canavan*, 42 Cal. 541; *Girard v. Philadelphia*, 7 Wall. 1; *Fearing v. Irwin*, 55 N. Y. 486; *Sloane v. State*, 8 Blackf. 351.

7 *Park Comm'rs v. Detroit*, 28 Mich. 228; *New Orleans etc. R. R. Co. v. New Orleans*, 24 La. An. 478; *Trustees etc. v. Mayor etc. of Aberdeen*, 13 Smedes & M. 645; *Hanson v. Vernon*, 27 Iowa, 23.

§ 39. Mode of exercising powers.—Corporations originating according to the rules of the common law must be governed by it, in their mode of organization, in the manner of exercising their powers, and in the use of the capacities conferred.¹ But the legislature may create a corporation, not only without conforming to the rules

of the common law, but in disregard of them; and when a corporation is thus created, its existence, powers, capacities, and mode of exercising them, must depend upon the law of its creation.² A corporation which relies upon a grant of power from the legislature for authority to do an act, is as much restricted to the mode prescribed by the statute or charter for its exercise, as to the thing allowed to be done.³ And the mode prescribed by the terms of the grant must be strictly pursued.⁴ If no mode is prescribed for the exercise of a power, the grant of which is clearly defined, the corporation may adopt such mode as, in its judgment, will secure the purpose contemplated.⁵ A corporation must exercise its powers in a reasonable manner, and the question whether the exercise shown is reasonable, is subject to judicial revision.⁶ A railway company is bound to exercise the power given to it in derogation of individual rights with moderation and discretion, and not negligently.⁷ The corporate powers are, as a general rule, vested in and are to be exercised by a majority of the body;⁸ and their vote, when confined to ordinary transactions, and consistent with the corporate objects, binds all.⁹ A corporate body has no corporate existence beyond the limits of the state which created it;¹⁰ and, in general, the exercise of the corporate rights and powers is confined within those limits.¹¹

1 *Penobscot Boom Co. v. Lamson*, 16 Me. 224.

2 *Penobscot Boom Co. v. Lamson*, 16 Me. 224; *Commissioner of Roads v. McPherson*, 1 Spear, 218; *Conro v. Port Henry Iron Co.* 12 Barb. 27; *Beatty v. Mar. Ins. Co.* 2 Johns. 109.

3 *Farmers' Loan etc. Co. v. Carroll*, 5 Barb. 613; and see *Holland v. San Francisco*, 7 Cal. 361; *Zottenuan v. San Francisco*, 20 id. 96; *Goodnow v. Comm'rs of Ramsey Co.* 11 Minn. 31; *First Presby. Church v. Fort Wayne*, 36 Ind. 338.

4 *Matthews v. Skinker*, 62 Mo. 329.

5 *Southern Life Ins. Co. v. Lanier*, 5 Fla. 110; and see *Smith v. Eureka Flour Mills Co.* 6 Cal. 1; *Richmond etc. R. R. Co. v. Richmond*, 26 Gratt. 83.

6 *St. Louis v. Weber*, 44 Mo. 547.

7 *Biscoe v. Great East. Railw. Co.* Law R. 16 Eq. 636.

8 *Gifford v. New Jersey R. R. Co.* 2 Stockt. 171; *Rex v. Whittaker*, 9 Barn. & C. 648; *St. Mary's Church*, 7 Serg. & R. 517; *Mowrey v. Indianapolis etc. R. R. Co.* 4 Bls. 78; *Eggleston v. Doolittle*, 33 Conn. 396.

9 *Despatch Line v. Bellamy Manuf. Co.* 12 N. H. 205; *Dudley v. Kentucky High School*, 9 Bush, 576; *Columbia Bottom Levee Co. v. Meier*, 19 Mo. 53.

10 *Day v. Newark etc. Manuf. Co.* 1 Blatchf. 628; *Miller v. Ewer*, 27 Me. 509; *Michigan Bank v. Gardner*, 15 Gray, 362.

11 *Matthews v. Trustees of Theolog. Sem.* 2 Brewst. 541; *Kennebec Co. v. Augusta etc. Banking Co.* 6 Gray, 204; *Conn. Mut. Life Ins. Co. v. Cross*, 18 Wis. 109.

§ 40. Powers in respect of property.—By the common law, corporations have, incidentally, a right to take, hold, and transmit in succession property, real and personal, to such an extent as may be necessary to carry into execution the object of their creation.¹ This right was and is of the essence of every corporation, whether created by license, or prescription, or legislative act,² and in the absence of any statutory prohibition, they may take by all the usual modes of acquiring property.³ A corporation, although created but for a limited period, may, nevertheless, acquire title in fee to lands necessary for its use.⁴ But a corporation cannot purchase and hold lands for purposes not authorized in its charter;⁵ and if chartered and organized for a specific purpose, it has no power to purchase or lease property unconnected with its legitimate business, and for the sole purpose of carrying on a suit and harassing another under the forms of law.⁶ A power to purchase includes a power to take a mortgage or pledge.⁷ A corporation may take a mortgage upon land by way of security for loans made in the course and according to the usage of its lawful operations, or in satisfaction of debts previously so contracted.⁸ Power to mortgage the property of a corporation for a particular purpose will not authorize the corporation to mortgage for different purposes, or to apply the funds so raised to other purposes.⁹ If a corporation is forbidden by its charter to purchase or take lands, a deed made to it would be void;¹⁰ but such prohibition does not necessarily forbid taking a mortgage to secure a debt.¹¹ Under a power to acquire property by gift, purchase, or otherwise, a corporation may take leasehold property;¹² and a power to

hire buildings authorizes the usual covenants to repair.¹³ In the absence of any restriction in its charter, the corporation may dispose of any lands, goods, or chattels which it has a right to acquire,¹⁴ or of any interest in the same it may deem expedient,¹⁵ having the same power in this respect as an individual.¹⁶ But without clear authority so to do, it can neither mortgage¹⁷ nor sell its franchises.¹⁸ The United States is a body politic and corporate,¹⁹ and is capable of holding property, real and personal.²⁰ But if the law of a state authorizes devises of real estate to be made only to natural persons, and to such corporations as are established by the law of the state, a devise of lands to the government of the United States is void;²¹ otherwise, where no such restriction exists.²² The mere right of a corporation chartered in one state to purchase and sell property, not being in its nature strictly a franchise, will be recognized and protected in the courts of another state,²³ subject to the qualification that the enjoyment and exercise of such right shall not be contrary to the laws or settled policy of the latter state, or prejudicial to its interests or those of its citizens.²⁴ An express enabling act of the legislature is not necessary.²⁵ In England, every corporation not expressly restricted therefrom by the charters or acts of parliament creating them, may acquire, hold, and deal with every species of personal property as fully and freely as an ordinary individual;²⁶ but their common-law right to take and hold lands and tenements has been restrained by the statutes of *mortmain*, which subject the power to acquire lands to the discretion of the crown or parliament as to the grant of a license.²⁷ The statutes of *mortmain* have not been re-enacted or adopted in this country,²⁸ except in the state of Pennsylvania,²⁹ where they are understood to extend only so far as they prohibit dedications of property to superstitious uses, and grants to a corporation without a statutory license;³⁰ and the objection to a grant of land to a corporation, which it is not authorized by its

charter to hold, can only be made by the commonwealth.⁸¹ No corporation or association for religious or charitable purposes can acquire or hold real estate in any territory of the United States of greater value than fifty thousand dollars, under penalty of forfeiture and escheat to the United States.⁸² In this country corporations are usually limited, in the acts of incorporation, as to the value or amount of real estate which they may hold. But a corporation has a right to accumulate its profits;⁸³ and if the property when purchased does not exceed the sum limited, the title to it cannot be affected by its rising in value to a greater amount;⁸⁴ and if of greater value, at first, the state alone has the right to disturb the title.⁸⁵

1 *Binney's Case*, 2 Bland, 142; *Reynolds v. Comm'rs etc.* 5 Ohio, 205; *McCartee v. Orph. Asy. Soc.* 9 Cowen, 47; *Ketchum v. Buffalo*, 14 N. Y. 356; *State v. Madison*, 7 Wis. 688; *Callaway etc. Co. v. Clark*, 52 Mo. 206; *Central Gold Min. Co. v. Platt*, 3 Daly, 263; *Page v. Heineberg*, 40 Vt. 81.

2 *Sherwood v. Am. Bible Soc.* 4 Abb. Ct. App. 227; *S. C. 1 Keyes*, 561.

3 *Roble v. Sedgwick*, 35 Barb. 319.

4 *Nicoll v. N. Y. etc. R. R. Co.* 12 N. Y. 121; *Rives v. Dudley*, 3 Jones Eq. 126.

5 *State v. Comm'rs of Mansfield*, 3 Zab. 510; and see *Natoma etc. Co. v. Clarkin*, 14 Cal. 544; *Coleman v. Turnpike R. Co.* 46 Id. 31; *First Parish in Sutton v. Cole*, 3 Pick. 232; *Chapin v. School District*, 36 N. H. 445.

6 *Occum Co. v. Sprague Manuf. Co.* 34 Conn. 29.

7 *Commercial Bank etc. v. Nolan*, 7 How. 508; *Aurora Agricultural etc. Soc. v. Paddock*, 30 Ill. 263. See *DeLoach v. Real Estate Bank*, 18 La. An. 447.

8 *Spafford v. First Nat. Bank etc.* 37 Iowa, 181; 18 Am. R. 6; *Thomaston Bank v. Stimpson*, 21 Me. 195; *Baird v. Bank of Washington*, 11 Serg. & R. 411; *Am. Mut. Life Ins. Co. v. Owen*, 15 Gray, 401.

9 *Trevilian v. Mayor of Exeter*, 27 Eng. L. & Eq. 578; and see *Leavitt v. Yates*, 4 Edw. Ch. 134.

10 *Leazure v. Hillegas*, 7 Serg. & R. 313.

11 *Blunt v. Walker*, 11 Wis. 334.

12 *Abby v. Billups*, 35 Miss. 618; and see *Steamboat Co. v. McCutcheon*, 13 Pa. St. 15.

13 *Abby v. Billups*, 35 Miss. 618.

14 *Barry v. Merchants' Ex. Co.* 1 Sand. Ch. 280; *Town Council of Newark v. Elliott*, 5 Ohio St. 113; *Burton's Appeal*, 57 Pa. St. 213; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543.

15 *Gibson v. Goldthwaite*, 7 Ala. 282; *Richardson v. Sibley*, 11 Allen, 65; *White Water etc. Canal Co. v. Vallette*, 21 How. 414. See *Bethlehem Borough v. Perseverance Fire Co.* 81 Pa. St. 445.

- 16 *Reynolds v. Comm'rs*, 5 Ohio, 204. Compare *Black v. Del. etc. Canal Co.* 22 N. J. Eq. 399; *Treadwell v. Salisbury Manuf. Co.* 7 Gray, 393, 404.
- 17 *Commonw. v. Smith*, 10 Allen, 448; *Pullan v. Cin. etc. R. R. Co.* 4 Biss. 35.
- 18 *Toledo Bank v. Bond*, 1 Ohio St. 622; and see *Middlesex R. R. Co. v. Boston etc. R. R. Co.* 115 Mass. 347; *Pierce v. Emery*, 32 N. H. 504.
- 19 *United States v. Maurice*, 2 Brock. 96.
- 20 *Cotton v. United States*, 11 How. 229.
- 21 In the Matter of Will of Fox, 52 N. Y. 530; 94 U. S. 315; and see *White v. Howard*, 46 N. Y. 144.
- 22 *Dickson v. United States*, 125 Mass. 311.
- 23 *Thompson v. Waters*, 25 Mich. 214; and see *Lathrop v. Commercial Bank*, 8 Dana, 114; *City of Covington v. Covington etc. Bridge Co.* 10 Bush, 69.
- 24 *Claremont Bridge v. Royce*, 42 Vt. 730; *Boyce v. St. Louis*, 29 Barb. 650; *Northern Transp. Co. v. Chicago*, 7 Biss. 52.
- 25 *Thompson v. Waters*, 25 Mich. 214; and see *Gilmer v. Lime Point*, 18 Cal. 251; *Whitman Min. Co. v. Baker*, 3 Nev. 336; *Life Ins. Co. v. Overholt*, 4 Dill. 237.
- 26 1 Kyd Corp. 104.
- 27 See *Farrar v. Vaughan*, 2 Ves. Sr. 188; *Simpson v. Westminster Palace Hotel Co.* 8 H. L. Cas. 712; *Horsey's Claim*, Law R. 5 Eq. 561; *McDonough Will Case*, 15 How. 357, 404.
- 28 See *Chambers v. St. Louis*, 29 Mo. 543; *Palge v. Heineburg*, 40 Vt. 81; *Davison College v. Chambers' Ex'rs*, 3 Jones' Eq. 253; *Potter v. Thornton*, 7 R. I. 252; *Odell v. Odell*, 10 Allen, 1.
- 29 *Purd. Dig.* 350.
- 30 *Leazure v. Hillegas*, 7 Serg. & R. 320; *Miller v. Porter*, 53 Pa. St. 292; and see *Runyan v. Lessee of Coster*, 14 Peters, 122.
- 31 *Gormdie v. Northampton Water Co.* 7 Pa. St. 233.
- 32 U. S. Rev. Stat. § 1890.
- 33 *Barry v. Merchants' Ex. Co.* 1 Sand. Ch. 230.
- 34 *Harpending v. Dutch Church*, 16 Peters, 455, 492; *Bogardus v. Trinity Church*, 4 Sand. Ch. 633. See *Commonw. v. Frankfort*, 13 Bush, 185.
- 35 *Humbert v. Trinity Church*, 24 Wend. 587; and see *Camp v. Dobblin*, 29 N. J. Eq. 36.

§ 41. Nature of corporate title.—The property of every corporation, including all its earnings and profits, belongs, primarily, to such corporation exclusively, and not to its members individually or collectively.¹ The abstract entity, the corporation, is the owner and the only owner of the property.² Money earned by the business of a corporation is corporate property, and does not become the separate property of the stockholders, until it is distributed among them by the corporation.³ The claims of stockholders are always subordinate to the claims of

creditors,⁴ and the property of a business corporation may be deemed a trust fund for the payment of debts.⁵ A corporation cannot take an estate in joint tenancy, either jointly with another corporation or with a natural person, if survivorship be an incident thereto;⁶ and if a corporation cannot hold land in its own name, it cannot hold it in the name of another, nor take a beneficial interest in it.⁷ An act conferring power upon a corporation to take by purchase, is to be construed subject to the restrictions and incapacities created by other general statutes.⁸ A conveyance which, if made by an individual, would be void within the statute of frauds, would also be void if made by a corporation.⁹ And ownership of property by a corporation may be proved by the same kind of evidence that would prove ownership in a natural person.¹⁰ The title to property may be vested in a company or association before it is incorporated, and no formal transfer is necessary, after incorporation, to vest such title in the corporation.¹¹

1 *Karnes v. Rochester etc. R. R.* 4 Abb. Pr. N. S. 107. See also *Goodwin v. Hardy*, 57 Me. 143.

2 *Reg. v. Arnaud*, 16 Law J. N. S. 50; 9 Ad. & E. N. S. 808.

3 *Jones v. Terre Haute etc. R. R. Co.* 57 N. Y. 196; *Curry v. Woodward*, 44 Ala. 305; *Phelps v. Farmers' etc. Bank*, 26 Conn. 289; *Burroughs v. No. Car. R. R. Co.* 67 No. Car. 376; *Rand v. Hubbell*, 115 Mass. 461; *Goodwin v. Hardy*, 57 Me. 143.

4 *City of Utica v. Churchill*, 33 N. Y. 161; and see *People v. Comm'rs*, 35 Id. 424; 4 Wall. 244; *Cunningham v. Vermont etc. R. R. Co.* 12 Gray, 411. But see *First Nat. Bank v. Faucher*, 43 N. Y. 524.

5 *San Francisco etc. R. R. Co. v. Bee*, 43 Cal. 398; and see *Verplanck v. Mercantile Ins. Co.* 1 Edw. Ch. 84, 87; *Karnes v. Rochester etc. R. R. Co.* 4 Abb. Pr. N. S. 107.

6 *Telfair v. Howe*, 3 Rich. Eq. 235.

7 *Coleman v. San Rafael etc. Road Co.* 49 Cal. 517. See *Fellows v. Miner*, 119 Mass. 541; *Chamberlain v. Chamberlain*, 43 N. Y. 424.

8 *McCartee v. Orph. Asy. Soc.* 9 Cowen, 437.

9 *Smith v. Morse*, 2 Cal. 524.

10 *Lowe v. State*, 46 Ind. 305.

11 *American Silk Works v. Saloman*, 4 Hun. 135; *S. O. 6 Thomp. & Co. 252*; *Boynton v. Hatch*, 47 N. Y. 225; and see *Rotch's Wharf Co. v. Judd*, 104 Mass. 224; *Benevolent Soc. v. Benevolent Soc.* 2 Tenn. Ch. 77; *Queensbury Industrial Soc. v. Pickles*, Law R. 1 Ex. 1.

§ 42. Presumptions in favor of title.—A corporation authorized to receive conveyances of land for certain

purposes, will be presumed to have received such a conveyance for some purpose within its powers, unless the contrary be shown.¹ And in an action by a corporation as the owner of certain property which it had the right to acquire, the law presumes that it was lawfully acquired, if the manner of its acquisition does not appear. It is incumbent upon the defendant to show that it was illegally obtained, if he relies upon that defense.²

1 *Chautauqua Co. Bank v. Risley*, 19 N. Y. 339; *Farmers' Loan etc. Co. v. Curtis*, 7 N. Y. 466; and see *Lindsley v. Simonds*, 2 Abb. Pr. N. S. 69.

2 *Farmers' etc. Bank v. Detroit etc. R. R. Co.* 17 Wis. 372.

§ 43. Powers in respect to contracts.—Unless restrained by law, every corporation has the incidental power to make any contract which may be necessary to advance the objects of its creation.¹ It may act and deal in the same manner that a natural person would, if he sought to accomplish the same end.² Thus, a corporation may borrow money to accomplish the purpose for which it was organized, wherever such power may be fairly implied as a usual and appropriate means to accomplish the objects of its charter,³ and may bind itself, by a written obligation, for its repayment.⁴ A company established for the purpose of trading, may make all such contracts as are of ordinary occurrence in that trade, and will be bound by them.⁵ Banks, insurance companies, and similar corporations, may be liable upon contracts which do not strictly conform to their charters.⁶ It is sufficient if there be a usage and practice under such circumstances as may be presumed to be within the general knowledge and by the consent of the company.⁷ A corporator may contract with his corporation;⁸ and there is no legal objection to such a contract, when the authority of the corporation to contract with its members is within the reason of the powers vested in it, and may be necessary for their execution, although this authority may not be expressly given by any statute.⁹ A corporation may make any

contract within its powers, in a foreign government, if the contract be not prohibited by that government;¹⁰ and the agents and officers of a corporation chartered in one state, may bind it by contracts and engagements made in another state,¹¹ if not contrary to good policy, or prejudicial to the interest of the latter state.¹² Corporations are presumed to contract within the powers and limitations of their charters;¹³ and it lies upon those who impeach any contract to show that it is void.¹⁴

1 *Galena v. Corevith*, 43 Ill. 423; *Strauss v. Eagle Ins. Co.* 5 Ohio St. 59; *Broughton v. Manchester Water-works Co.* 3 Barn. & Ald. 1; *Schbrecht v. New Orleans*, 12 La. 496; *Brooklyn Gravel Road Co. v. Slaughter*, 33 Ind. 185; *Weckler v. First Nat. Bank*, 43 Md. 581; *Goodrich v. Detroit*, 13 Mich. 279; *Bateman v. Mayor etc.* 3 Hurl. & N. 322; *Douglass v. Virginia City*, 5 Nev. 147.

2 *Union Water Co. v. Murphy's Flat Fluming Co.* 22 Cal. 620; *Feeny v. People's Fire Ins. Co.* 2 Robt. 509; *State Bank v. Cape Fear Bank*, 13 Ired. 75.

3 *Partridge v. Badger*, 25 Barb. 146; *Barnes v. Ontario Bank*, 19 N. Y. 132; *Davis v. Proprietors etc.* 8 Met. 321; *Union Min. Co. v. Rocky Mt. Nat. Bank*, 2 Cal. 248; *Moss v. Haspeth Academy*, 7 Helsk. 283.

4 *Frye v. Tucker*, 24 Ill. 180; *Clarke v. School District etc.* 3 R. I. 199; *Smith v. Law*, 21 N. Y. 236; *Eastern Union Railw. Co. v. Hart*, 8 Exch. 116; *S. O. 14 Eng. L. & Eq.* 535; *Covington v. Covington etc. Bridge Co.* 10 Bush, 63; *Thompson v. Lambert*, 44 Iowa, 239; *Gardner v. London etc. Railw. Co.* Law R. 2 Ch. 201.

5 *In re Contract Co.* Law R. 8 Eq. 14; *Colliery Co. v. Waddle*, Law R. 3 C. P. 463; *Nicholson v. Bradfield Union*, Law R. 1 Q. B. 620. One railroad company may, upon a sufficient consideration, guarantee the bonds of another railroad company; *Low v. Cent. Pacif. R. R. Co.* 52 Cal. 53; 28 Am. R. 629.

6 *Buckley v. Derby Fish. Co.* 2 Conn. 252.

7 *White v. Derby Fish. Co.* 2 Conn. 260; *Kilgore v. Bulkley*, 14 Id. 382.

8 *Culbertson v. Wabash Nav. Co.* 4 McLean, 544.

9 *Revere v. Boston Copper Co.* 15 Pick. 135; *Middlesex Turnpike Co. v. Swan*, 10 Mass. 384; and see *Ely v. Sprague*, 1 Clarke Ch. 351; *Gordon v. Preston*, 1 Watts, 385. A promissory note made by a corporation to its trustees is against public policy, and void; *Wilbur v. Lynde*, 49 Cal. 290; 19 Am. R. 645.

10 *Bank of Augusta v. Earle*, 13 Peters, 519; *Blair v. Perpetual Ins. Co.* 10 Mo. 553; *Tombigbee R. R. Co. v. Kneeland*, 4 How. 16; *Weymouth v. Wash. etc. R. R. Co.* 1 McArthur, 19.

11 *Arms v. Conant*, 36 Vt. 744; *Ohio etc. R. R. Co. v. Wheeler*, 1 Black, 286; *Day v. Newark India Rubber Co.* 1 Blatchf. 628; *Wood Hydraulic etc. Co. v. King*, 45 Ga. 34; *Christian Union v. Yount*, 101 U. S. 71.

12 *Newburg Petroleum Co. v. Weare*, 27 Ohio St. 343; *Home Ins. Co. v. Davis*, 29 Mich. 238; *Smith v. Alvord*, 63 Barb. 415; *State v. Fouldick*, 21 La. An. 434; *Cowell v. Springs Co.* 100 U. S. 65.

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13 *Morris etc. R. R. Co. v. Sussex R. R. Co.* 20 N. J. Eq. 542; *Union Water Co. v. Murphy Co.* 22 Cal. 620; *Alabama etc. Ins. Co. v. Central etc. Assoc.* 54 Ala. 73; *Railw. Co. v. McCarthy*, 96 U. S. 258, 267; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62; *Hope Mut. Life Ins. Co. v. Taylor*, 3 Robt. 278.

14 *Yates v. Van De Bogert*, 56 N. Y. 526; *Oxford Iron Co. v. Spradley*, 46 Ala. 98; *Downing v. Mt. Wash. Co.* 40 N. H. 230; *Dana v. Bank of St. Paul*, 4 Minn. 385; *Scottish etc. Railw. Co. v. Stewart*, 3 Macq. 382; *Shrewsbury etc. Railw. Co. v. Northwestern Railw. Co.* 6 H. L. Cas. 113.

§ 44. *Mode of contracting.*—When the act of incorporation prescribes a mode of contracting, the corporation must observe that mode, or the instrument no more creates a contract than if the body had not been incorporated.¹ But unless the mode be prescribed and limited, a corporation, like an individual, may be bound by an implied contract,² to be deduced by inference from the corporate acts,³ provided it is within the scope of its corporate authority.⁴ Wherever a corporation is acting within the scope of the legitimate purposes of its institution, all parole contracts made by its authorized agents are express promises of the corporation;⁵ and all duties imposed upon them by law and all benefits conferred at their request raise implied promises, for the enforcement of which an action will lie.⁶ And a vote of the corporation is not necessary to be shown in order to authorize a contract made on its behalf by an agent or officer in the scope of his usual authority.⁷ In the case of a contract by a corporation in this country, a seal is no longer deemed as of any more necessity or significance than in the case of a contract by a natural person.⁸ And unless the act of incorporation expressly prescribes the contrary, the duly authorized agents of corporations may, within the scope of their authority, bind them by simple as well as by sealed contracts.⁹ So, it is the established doctrine in England, that a trading corporation may contract without seal for a purpose connected with the objects of the incorporation, provided such contract does not relate to matters of a special and unusual nature;¹⁰ the absence of a seal will be excused as it respects matters of trivial and every-day occurrences.¹¹ Less strictness, as it respects the name, is

required in contracts with corporations than in actions by or against them.¹² In the former case it is sufficient if the name of the corporation be so given as to distinguish it from other corporations.¹³ The individual members of a corporation cannot, unless authorized, bind the body by express promises;¹⁴ nor can any corporate engagement be implied from their unsanctioned conduct or declarations.¹⁵ Whenever a corporation makes a contract, the only rights it can claim under such contract are those which are given to it in its corporate capacity, and not the rights which belong to its members as the citizens of a state.¹⁶

1 *Harborough v. Shordlow*, 7 Mees. & W. 87; 2 Eng. Railw. Cas. 253; *White v. New Orleans*, 15 La. An. 667; *Head v. Ins. Co.* 2 Cranch, 127; *Baltimore v. Reynolds*, 20 Md. 1; *Zottman v. San Francisco*, 20 Cal. 390; *Pimento v. San Francisco*, 21 id. 351; *Bladen v. Philadelphia*, 60 Pa. St. 464.

2 *N. Y. etc. R. R. Co. v. Mayor etc.* 1 Hilt. 562; *Lowe v. London etc. Railw. Co.* 14 Eng. L. & Eq. 18; and see *McSpedon v. Mayor etc.* 20 How. Pr. 385; 7 Bosw. 601.

3 *Maher v. City of Chicago*, 38 Ill. 266; *Abbot v. Herman*, 7 Me. 118; *Abby v. Billups*, 35 Miss. 618; *Frankfort Bridge Co. v. City of Frankfort*, 18 B. Mon. 41; *Gowan Marble Co. v. Tarrant*, 73 Ill. 608.

4 *N. Y. etc. R. R. Co. v. Mayor etc.* 1 Hilt. 562; and see *Silliman v. Fredericksburg etc. R. R. Co.* 27 Gratt. 119.

5 *Fanning v. Gregoire*, 16 How. 624; *Fleckner v. Bank of U. S.* 8 Wheat. 333; *McCullough v. Talladega Ins. Co.* 46 Ala. 376. Compare *Trustees etc. v. Johnson*, 53 Ind. 273.

6 *Blunt v. Walker*, 11 Wis. 334; *Maine Stage Co. v. Longley*, 14 Me. 444; *Peterson v. Mayor etc.* 17 N. Y. 449; *Madison etc. R. R. Co. v. Norwich Sav. Soc.* 24 Ind. 457; *Board of Education v. Greenebaum*, 39 Ill. 609.

7 *Lime Rock Bank v. Macomber*, 29 Me. 564; *Eastman v. Coos Bank*, 1 N. H. 23; and see *Consociated Presby. Soc. v. Staples*, 23 Conn. 544.

8 *Bank of Columbia v. Patterson*, 7 Cranch, 299; *Savings Bank v. Davis*, 8 Conn. 191; *New Athens v. Thomas*, 82 Ill. 259; *Watson v. Bennett*, 12 Barb. 196; *Hamilton v. New Castle R. R. Co.* 9 Ind. 359; *Peterson v. Mayor etc. of N. Y.* 17 N. Y. 449; and see *Missouri River etc. R. R. Co. v. Commrs.*, 12 Kans. 482.

9 *McCullough v. Talladega Ins. Co.* 46 Ala. 376. See *San Antonio v. Gould*, 34 Tex. 49.

10 *South of Ireland Colliery Co. v. Waddle*, Law R. 3 C. P. 463; *Nicholson v. Guardians etc.* Law R. 1 Q. B. 620; *Henderson v. Australian Royal Mail etc. Co.* 5 El. & B. 409; *In re Contract Corp.* Law R. 8 Eq. 14.

11 *Manby v. Long*, 3 Lev. 107; *Wells v. Mayor etc.* Law R. 10 C. P. 402; *Bank of U. S. v. Dandridge*, 12 Wheat. 64. See *Austin v. Guardians etc.* Law R. 9 C. P. 91.

12 See *CORPORATE NAME*, § 29, *ante*.

13 *Hagerstown Turnp. Co. v. Creeger*, 5 Har. & J. 122; and see *Newport Manuf. Co. v. Starbird*, 10 N. H. 123; *Stein v. Indianapolis Assoc.* 18 Ind. 237.

14 *Soper v. Buffalo etc. R. R. Co.* 19 Barb. 310; *Ruby v. Abyssinian Soc.* 15 Me. 306; *Regents of University v. Williams*, 9 Gill & J. 363.

15 *Dunn v. St. Andrews Church*, 14 Johns. 118; *Proprietors etc. v. Gordon*, 1 Pick. 297.

16 *Bank of Augusta v. Earle*, 13 Peters, 519; and see *Vt. Cent. R. R. Co. v. Claves*, 21 Vt. 30.

§ 45. **Principles of construction.**—General words used in a corporate contract which admit a double construction, will be construed consistently with the charter.¹ Contracts made by the officers of a corporation will be presumed to have been made in pursuance of the authority derived from the statutes of the state under which the corporation was organized, rather than of that derived from a foreign incorporation under the same name.² A contract by a corporation, which is entirely foreign to the objects and purposes of its charter, is void.³ But a company having power to contract for the purchase of goods, is bound by such contract, although the goods may not be intended for the use of the company, and although this fact may be known to the person with whom the contract is entered into.⁴ A contract, valid in part, and invalid as to the residue, for want of power in the corporation to make the entire contract, will be valid to the extent of the power, and void only as to the excess.⁵ The contract obligations of a corporation survive the dissolution of the corporation.⁶ And where a corporation changes its name for convenience, but continues in the same general business with the same officers, it is responsible under the new name for all its previous debts.⁷ In the case of a contract entered into with a corporation, to be executed in the future, the contingency of the continued existence of the corporation must be regarded as having been in the view of the parties.⁸ Contracts of a corporation, open to the objection that they are in violation of law, may be legalized by a special act of the legislature.⁹ A contract made by a corporation which, by statute, it is expressly prohibited from making, is so far void, that the corporation cannot maintain an action thereon, although the

statute does not in terms declare that the contract shall be void, but merely prescribes a penalty for making it.¹⁰ A statute provision that "no corporation shall engage in mercantile or agricultural business, nor in commission, brokerage, stock-jobbing, exchange, or banking business of any kind," does not invalidate a single isolated contract for the purchase of goods.¹¹

1 Morris etc. R. R. Co. v. Sussex R. R. Co. 20 N. J. Eq. 543; and see Thompson v. Lambert, 44 Iowa, 239.

2 Dean v. La Motte Lead Co. 59 Mo. 523.

3 Rock River Bank v. Sherwood, 10 Wis. 230. See *infra*, ULTRA VIRES.

4 In re Contract Corp. Law R. 8 Eq. 14.

5 Grand Gulf Bank v. Archer, 8 Smedes & M. 151.

6 Nevitt v. Bank of Port Gibson, 6 Smedes & M. 513; and see People v. President etc. of Cal. College, 38 Cal. 186; Chicago etc. R. R. Co. v. Howard, 7 Wall, 392; Revere v. Boston Copper Co. 15 Pick. 351.

7 Dean v. La Motte Lead Co. 59 Mo. 523. But see Conant v. Nat. Ice Co. 8 Jones & S. 84.

8 Houston v. Jefferson College, 63 Pa. St. 428.

9 White Water etc. Canal v. Vallette, 21 How. 414; City of Bridgeport v. Housatonic R. R. Co. 15 Conn. 475.

10 Ctn. etc. Ins. Co. v. Rosenthal, 55 Ill. 85. See Fleckner v. U. S. Bank, 8 Wheat. 338; Nat. Bank v. Matthews, 95 U. S. 621; Leavitt v. Palmer, 3 N. Y. 19; White v. Franklin Bank, 22 Pick. 181; Blair v. Perpetual Ins. Co. 10 Mo. 559.

11 Graham v. Hendricks, 23 La. An. 523.

§ 46. Capacity to sue.—The power to sue is one of the common-law incidents of a corporation.¹ And this power has been upheld, notwithstanding defects of organization, or other peculiar circumstances relied upon to defeat it.² Corporations, public or private, may sue upon all promises and obligations made to them,³ which fall within the scope of the legitimate purposes of the corporation.⁴ So, a corporation may sue for injuries done to the body corporate, or to the corporate property;⁵ and in a proper case can maintain a bill of interpleader.⁶ In England, a corporation aggregate may, as the petitioning creditor, sue out a commission of bankruptcy.⁷ The fact that a state is the sole proprietor of a corporation, does not prevent the corporation from suing.⁸ If the charter

of a corporation does not in terms give the power to refer to arbitration, the power to sue includes a power of reference.⁹ But if the charter directs that controversies shall be decided by a designated tribunal, the jurisdiction will be deemed exclusive, and an action at law cannot be maintained in a case where such tribunals have jurisdiction to decide.¹⁰ Under the common law a corporation cannot maintain a suit after its charter has expired.¹¹

1 See *Bartlett v. Brickett*, 14 Allen, 82.

2 *Balt. etc. R. R. Co. v. Gallahue*, 12 Gratt. 655; *Bangor etc. R. R. Co. v. Smith*, 47 Me. 34; *Holmes v. Gilliland*, 41 Barb. 568; *Town of Shrewsbury v. Brown*, 25 Vt. 197. But see *Workingmen's etc. Bank v. Converse*, 29 La. An. 369.

3 *Mayor of Stafford v. Till*, 4 Bing. 54; *Gordon v. Mayor etc. of Balt.* 5 Gill, 231; *Portsmouth Livery Co. v. Watson*, 10 Mass. 91.

4 *Ancient City Club v. Miller*, 7 Lans. 412.

5 *Am. Mut. Ins. Co. v. Owen*, 15 Gray, 491; *Knickerbocker Life Ins. Co. v. Ecclesine*, 42 How. Pr. 201; 11 Abb. Pr. (N. S.) 385; *Trenton Ins. Co. v. Perrine*, 3 Zab. 402; *Metrop. Saloon Co. v. Hawkins*, 4 Hurl. & N. 87; *Goodspeed v. East Haddam Bank*, 23 Conn. 529, 536.

6 *Mills v. Townsend*, 109 Mass. 115.

7 *Ex parte Bank of Ireland*, 1 Molloy, 261.

8 *Hutchinson v. Taylor*, 6 Helsk. 634.

9 *Day v. Essex Co. Bank*, 13 Vt. 87; *Alex. Canal Co. v. Swann*, 5 How. 53.

10 *Bassett v. Carleton*, 32 Me. 553; and see *Thompson v. Planet etc. Building Soc. Law R.* 15 Eq. 333; *Wright v. Monarch etc. Building Soc. Law R.* 3 Ch. Div. 726.

11 *Building Assoc. v. Anderson*, 7 Phil. (Pa.) 106.

§ 47. Name in which to sue.—In general a corporation can sue only by its corporate name;¹ in the name and style given to it by law.² Where a contract is made with a corporation through an agent, the action must be brought in the name of the corporation.³ So, the trustees of a corporation should sue in the corporate name only.⁴ An action upon a note made payable to the treasurer of a corporation, or his successor in office, for the use of the corporation, is rightfully brought in the name of the corporation.⁵ After a change of name the corporation should sue by its new name.⁶ A legislative change of the name does not impair its right to sue on a note executed to it by the old name.⁷ A slight variation between the name in

which a corporation has brought suit and the name by which the papers which it offers in evidence under the plea of the general issue, to prove its incorporation, show it to have been incorporated, ought to be disregarded.³

1 *Curtiss v. Murry*, 26 Cal. 633; *Norton v. Hodges*, 100 Mass. 241; *Bradley v. Richardson*, 2 Blatchf. 343.

2 *Porter v. Nekervis*, 4 Rand. 359; and see *Dark v. Houston*, 22 Ga. 506; *Mauney v. Motz*, 4 Ired. Eq. 155.

3 *Garland v. Reynolds*, 20 Me. 45; *Commercial Bank v. French*, 21 Pick. 486. See *Myers v. Machado*, 6 Abb. Pr. 198.

4 *Hundy v. Birdsall*, 29 Barb. 31; and see *Leonardsville Bank v. Wilhail*, 25 N. Y. 574; *Lowenthal v. Wiseman*, 58 Barb. 490; *Brittain v. Newland*, 2 Dev. & B. Eq. 363.

5 *Warren Academy v. Starrett*, 15 Me. 443. See *Haynes v. Covington*, 13 Smedes & M. 408; *Timms v. Williams*, 3 Ad. & E. N. S. 413.

6 *Madison College v. Burke*, 6 Ala. 494; *Gould v. Sub-district No. 3 etc.* 7 Minn. 203; *Mayor etc. of Colchester v. Seaber*, 3 Burr. 1866; and see *Eaton etc. R. R. Co. v. Hunt*, 20 Ind. 457; *Racine County Bank v. Ayers*, 12 Wis. 512.

7 *Trustees etc. v. Schwagler*, 37 Iowa, 577.

8 *Thatcher v. West River Nat. Bank*, 19 Mich. 196.

§ 43. In what courts suit may be brought.—A corporation in a foreign country may sue as such in the English courts.¹ So, a corporation created by the laws of a foreign country may sue in one of the state courts in this country;² or it may sue in the federal courts.³ A corporation created by any state has power to sue in the federal courts as if it were a citizen of that state.⁴ And in the absence of any restraining statute, corporations created by the laws of any one state are competent, as artificial persons, to bring suit in the courts of other states.⁵ A suit by a corporation in its corporate name must be presumed to be a suit by a citizen of the state under whose laws the corporation exists;⁶ and this presumption cannot be countervailed by averment or evidence to the contrary, for the purpose of withdrawing the suit from the jurisdiction of a court of the United States.⁷ The fact that a state is a member of a corporation suing in a circuit court, does not prevent such court from entertaining jurisdiction of the action.⁸ The United States of America suing in their corporate capacity in a court of Great Brit-

ain, thereby submit themselves to its jurisdiction, and can only obtain relief subject to the control of the court and pursuant to the rules of practice.⁹ A suit by a corporation created by the United States is a suit arising under the laws of the United States.¹⁰

1 *Henriques v. Dutch West India Co.* 2 Ld. Raym. 1535; *Nat. Bank of St. Charles v. De Bernales*, 1 Car. & P. 569; *Ryan & M.* 190; and see *United States v. Wagner*, Law R. 3 Eq. 724.

2 *British Am. Land Co. v. Ames*, 6 Met. 391.

3 *Soc. for Prop. of Gospel v. Wheeler*, 2 Gall. 105.

4 *Muller v. Dows*, 94 U. S. 444; *Railway Co. v. Whitton*, 13 Wall. 270; *Insurance Co. v. The "C. D. Jr."* 1 Wood, 72; *Nat. Park Bank v. Nichols*, 4 Bls. 315; *Marshall v. Balt.* etc. R. R. Co. 16 How. 314; *Williams v. Mo.* etc. R. R. Co. 3 Dill. 267.

5 *Fisk v. Chicago* etc. R. R. Co. 4 Abb. Pr. N. S. 378; *Savage Manuf. Co. v. Armstrong*, 17 Me. 34; *Eslava v. Ames* *Flow Co.* 47 Ala. 384; *Williams v. Creswell*, 51 Miss. 817. See *Lathrop v. Union Pacific R. R. Co.* 1 McAr. 234.

6 *Lathrop v. Union Pacific R. R. Co.* 1 McAr. 234; *Hatch v. Chicago* etc. R. R. Co. 6 Blatchf. 105; *Stevens v. Phoenix Ins. Co.* 41 N. Y. 149; *United States v. Insurance Companies*, 23 Wall. 93.

7 *Educational Soc. v. Varney*, 54 N. H. 376; *County of Alleghany v. Cleveland* etc. R. R. Co. 51 Pa. St. 223; *Ohio* etc. R. R. Co. v. *Wheeler*, 1 Black, 236.

8 *U. S. Bank v. Planter's Bank*, 9 Wheat. 904.

9 *Pringle v. United States*, Law R. 2 Eq. 659.

10 *Osborne v. Bank of U. S.* 9 Wheat. 733; *Union Pacific R. R. Co. v. McComb*, 53 How. Pr. 478.

§ 49. **Disfranchisement of members.**—A corporation possesses inherently the power to disfranchise members for either of the following causes: *First.* When an offense is committed by a member, which has no immediate relation to his corporate duty, but is of so infamous a nature as to render him unfit for the society of honest men. *Second.* When an offense is against the duty of a member as a corporator, in which case he may be expelled, on trial and conviction, by the corporation. *Third.* When the offense is of a mixed nature, compounded of the two first mentioned.¹ Before an expulsion is made for an offense of the kind first mentioned, it is necessary that there should be a previous conviction by a jury, according to the law of the land.² And the exercise of the power to disfranchise does not affect the private rights

of the corporator in the franchise;³ a member of a joint-stock company, or of any corporation owning property, cannot be expelled, and thus deprived of his interest in the stock or general fund, unless such power has been expressly conferred by the charter.⁴ And where the right to expel for just cause exists, it cannot be exercised in an arbitrary and summary manner, but the party charged with the violation of duty should have an opportunity to be heard.⁵ Nor will an incorporated society be permitted to use its power to expel members for purposes of personal or private revenge, or make it the instrument of religious intolerance, or political proscription.⁶ Where the constitution of an incorporated society makes "slander against the society" by a member, an offense for which he may be fined or expelled, such a provision will be construed as intending an offense analogous to slander as defined by the common law.⁷

1 *Leech v. Harris*, 2 Brewst. 571; *People v. Chicago Board of Trade*, 45 Ill. 112; *Smith v. Smith*, 3 Dessaus. Eq. 557; *People v. N. Y. Com. Ass.* 18 Abb. Pr. 271; *People v. Medical Soc.* 24 Barb. 570; *People v. Fire Underwriters*, 7 Hun, 248; *State v. Chamber of Commerce*, 20 Wis. 63.

2 *Commonw. v. St. Patrick's Soc.* 2 Binn. 448; *Commonw. v. Guardians of Poor*, 6 Serg. & R. 469; and see *Soc. for Visitation of Sick v. Meyer*, 52 Pa. St. 125.

3 *Evans v. Phila. Club*, 50 Pa. St. 107.

4 *Boggs' Case*, 11 Code R. 99; *Evans v. Phila. Club*, 50 Pa. St. 107; and see *State v. Tudor*, 5 Day, 329; *Davis v. Bank of England*, 2 Bing. 393.

5 *People v. St. Francis Ben. Soc.* 24 How. Pr. 216; *People v. Sailor's Snug Harbor*, 5 Abb. Pr. N. S. 119; 54 Barb. 532; *Southern Plank Road Co. v. Hixon*, 5 Ind. 165; *State v. Adams*, 44 Mo. 570; *White v. Brownell*, 2 Daly, 329; *Sibley v. Carteret Club*, 40 N. J. L. 295.

6 *State v. Georgia Med. Soc.* 33 Ga. 608; *People v. St. Francis Ben. Soc.* 24 How. Pr. 216; and see *People v. Farrington*, 23 How. Pr. 294.

7 *Roehler v. Mechanic's Aid Soc.* 22 Mich. 86.

§ 50. Corporate seal.—Without an express grant, it is incident to every corporation to have a common seal;¹ and a corporation, like an individual, may adopt and use what seal it will.² But in order to bind a corporation by specialty, the instrument must be sealed with the corporate seal;³ and the private seal of an agent, professing to

act for a corporation, does not bind the corporation as if by corporate deed.⁴ And though the corporation may have authorized the agent to contract, and may, therefore, be liable in some form of action,⁵ covenant is not the proper remedy.⁶ So, the mere fact that an instrument, purporting to be executed by a corporation, has the corporate seal attached, does not make it the act of the corporation, unless it was affixed by a person duly qualified.⁷ But the seal itself is *prima facie* evidence that it was affixed by proper authority;⁸ and the burden of proof to show want of authority, lies upon the party who seeks to impeach the instrument on that ground.⁹ A corporation may adopt any seal they choose for the time being;¹⁰ and although they have adopted a particular seal, they will be bound by a deed, otherwise sufficient, which is sealed with any seal.¹¹ The act of the trustees or agents of a corporation in signing their separate names to a deed or contract, under the corporate seal, does not vitiate the instrument, though such signatures are unnecessary.¹² Nor is the instrument vitiated by affixing the corporate seal separately to each name, so signed.¹³ And where a corporation has no seal, and has authority to contract both with and without one, the affixing of the private seal of the president to his signature is mere surplusage, and harmless.¹⁴ It was essential at common law that the seal should be impressed upon wax, wafer, clay, or some other impressible and tenacious substance.¹⁵ But this doctrine has been much relaxed in modern times, and a distinct impression of the seal, on the instrument calling for the seal of the corporation, is generally deemed a sufficient seal, without wax or wafer.¹⁶ In many of the States, a flourish with a pen, at the end of a name,¹⁷ or a scroll,¹⁸ has been allowed to be a valid substitute for a seal.¹⁹ The seal of a corporation attached to an instrument is not evidence of its own authenticity, but it must be proved to be really the seal of the corporation;²⁰ and the common practice is to establish its authenticity, by a witness ac-

quainted with its impression.²¹ The effect of affixing the corporate seal to a contract is to make the instrument a specialty;²² and the rule that an instrument under seal imports a consideration, applies as strongly to one made by a corporation acting within its powers, as to a natural person.²³ The doctrine of the strict common law, that a corporation alone speaks by its corporate seal,²⁴ is universally abandoned in the United States;²⁵ and corporations, with regard to their mode of appointing agents,²⁶ and making contracts in general,²⁷ are placed upon the same footing with natural persons.²⁸ The strictness of the ancient rule has likewise been relaxed in England, and many contracts made by or with corporations are now deemed valid, though not under seal.²⁹ But where a statute makes sealing an essential condition for the validity of a contract, this formality must of course be observed.³⁰

1 Case of Sutton's Hospital, 10 Co. R. 30 b; Mayor etc. v. Charlton, 6 Mees. & W. 815; Mayor etc. v. Hardwick, Law R. 8 Exch. 24.

2 Everett v. United States, 6 Port. 166; Charleston v. Morehead, 2 Rich. 430; Ransom v. Stonington etc. Bank, 13 N. J. Eq. 212.

3 Damon v. Granby, 2 Pick. 345; Haight v. Sahler, 30 Barb. 218; Bank of Columbia v. Patterson, 7 Cranch, 299, 304.

4 State v. Allis, 18 Ark. 269; Randolph v. Van Vechten, 19 Johns. 60; Willey v. Board of Education, 11 Minn. 371.

5 Bank of Metropolis v. Gutschlick, 14 Peters, 19; Porter v. Androscoggin etc. R. R. Co. 37 Me. 349; Regents etc. v. Detroit etc. Soc. 12 Mich. 133.

6 Mitchell v. St. Andrew's Bay Land Co. 4 Fla. 200; Farmers' etc. Turnp. Co. v. McCullough, 25 Pa. St. 303.

7 Bank of Ireland v. Evans, 5 H. L. Cas. 339; Koebler v. Black River Co. 2 Black. 715; Hoyt v. Thompson, 5 N. Y. 320; Bank of U. S. v. Dandridge, 12 Wheat. 64, 68.

8 Solomon's Lodge v. Montmoulin, 58 Ga. 547; Evans v. Lee, 11 Nev. 194; St. Louis Public Schools v. Risley, 28 Mo. 415; St. John's Church v. Steinmetz, 18 Pa. St. 273; Hopkins v. Gallatin Turnp. Co. 4 Humph. 403.

9 Morris v. Kell, 20 Minn. 531; Musser v. Johnson, 43 Mo. 74; Union Gold Mine Co. v. Bank, 2 Colo. 226; Josey v. Railroad Co. 12 Rich. 134; Conine v. Junction etc. R. R. Co. 3 Houst. 288.

10 Bank of Middlebury v. Wash. etc. R. R. Co. 30 Vt. 159; South Baptist Soc. v. Clapp, 18 Barb. 36.

11 Tenney v. East Warren Lumber Co. 43 N. H. 343; Hutchins v. Byrnes, 9 Gray, 367; Mann v. Pents, 2 Sand. Ch. 257.

12 Clark v. Farmers' Wool. Manuf. Co. 15 Wend. 266.

13 Jackson v. Walsh, 3 Johns. 226.

14 *Deberry v. Holly Springs*, 35 Miss. 385; and see *Curry v. Bank of Mobile*, 8 Port. 361; *Mayor etc. of Ludlow v. Charlton*, 6 Mees. & W. 615.

15 See *Warren v. Lynch*, 5 Johns. 239; *Rochester Bank v. Gray*, 2 Hill, 227; *Colt v. Milliken*, 1 Denio, 376.

16 *Allen v. Sullivan R. R.* 32 N. H. 446; *Corrigan v. Trenton etc. Falls Co.* 1 Halst. Ch. 52; *Haven v. Grand Junction Railw. Co.* 13 Allen, 337; *Hendee v. Pinkerton*, 14 Id. 381; *Davidson v. Cooper*, 11 Mees. & W. 778; 13 Id. 343; *In re SandHills*, Law R. 6 Com. P. 411.

17 See *Reynolds v. Trustees etc.* 6 Dana, 37; *Van Claricum v. Yeo*, 2 Blackf. 322; *Crossman v. Hiltown etc. Co.* 3 Grant Cas. 225.

18 *Johnston v. Crawley*, 25 Ga. 316; *Underwood v. Dollins*, 47 Mo. 259; *McMillen v. Bethold*, 40 Ill. 34; *Chilton v. People*, 66 Id. 501; *Hollis v. Pond*, 7 Humph. 222; *Trasher v. Everhart*, 3 Gill & J. 234.

19 See *Alexander v. Jameson*, 5 Binn. 238; *Harden v. Webster*, 29 Ga. 427; *Jones v. Longwood*, 1 Wash. 42; *Pease v. Lawson*, 33 Mo. 35.

20 *Dow v. Vreelandt*, 6 N. J. L. 352; *Foster v. Shaw*, 7 Serg. & R. 163; *Molnes v. Thompson*, 9 Term Rep. 303.

21 *Farmers' Turnp. Co. v. McCullough*, 25 Pa. St. 303; *Darnell v. Dickens*, 4 Yerg. 7; *City Council v. Morehead*, 2 Rich. L. 430.

22 *Benolst v. Inhabitants etc.* 8 Mo. 250; *Porter v. Androscoggin etc. R. R. Co.* 37 Me. 349; *Merritt v. Cole*, 9 Hun. 98; *Clark v. Wool. Manuf. Co.* 15 Wend. 238; *Steele v. Oswego etc. Manuf. Co.* 13 Id. 265. That the seal of a corporation is equally appropriate as a means of evidencing its assent to be bound by a simple contract as by a specialty: see *Cent. Nat. Bank v. Charlotte etc. R. R. Co.* 5 So. Car. 156; 32 Am. R. 12.

23 *Sturtevant v. City of Alton*, 3 McLean, 393.

24 See *Arnold v. Mayor of Poole*, 4 Man. & G. 860; *Diggle v. London, etc. Railw. Co.* 5 Ex. 442.

25 *Chesapeake etc. Canal Co. v. Knapp*, 9 Peters, 541; *Savings Bank v. Davis*, 8 Conn. 191; *Fleckner v. Bank of U. S.* 8 Wheat. 338.

26 *Dispatch Line of Packets v. Bellamy Manuf. Co.* 12 N. H. 205; *North. Cent. R. R. Co. v. Bastian*, 15 Md. 484; *St. Mary's Church v. Cagger*, 6 Barb. 576; *Buckley v. Briggs*, 30 Mo. 452; *Paret v. City of Bayonne*, 39 N. J. L. 539; *Sheffield School Township v. Andress*, 56 Ind. 157; *Town of New Athens v. Thomas*, 82 Ill. 259.

27 *Bank of Columbia v. Patterson*, 7 Cranch, 299; and see § 44 ante.

28 See *Brady v. Mayor etc.* 1 Barb. 584; *Barry v. Merchants' Ex. Co.* 1 Sand. Ch. 280, 290; *Western etc. Soc. v. Philadelphia*, 31 Pa. St. 175; *Alton v. Mulledy*, 21 Ill. 76.

29 See *East London Waterworks v. Bailey*, 4 Bing. 283; *Church v. Imperial Gas Light etc. Co.* 6 Ad. & E. 846; *Nicholson v. Bradfield Union*, Law R. 1 Q. B. 620.

30 *Freud v. Dennett*, 27 Law J. Com. P. 314.

§ 51. Power to hold property in trust.—A corporation cannot act as trustee in relation to any matter in which it has no interest;¹ and cannot be seized of land in trust for purposes foreign to its institution.² But, in general, a corporation having the legal capacity to take real or personal estate, may take and hold it upon trust, in the same manner and to the same extent as may a private per-

son.³ And where property is devised or granted to a corporation, partly for its own use, and partly for the use of others, the power to take and hold the property for its own use carries with it, as a necessary incident, the power to execute that part of the trust which relates to others.⁴ If the trust be repugnant to, or inconsistent with, the proper purposes for which the corporation was created, it cannot be compelled to execute the trust;⁵ and it will be necessary for the proper court to substitute a new trustee for that purpose.⁶ But in proper cases, the performance of the trusts confided to corporations may be enforced.⁷ And a corporation which expressly accepts a donation upon the trusts and for the purposes for which it was given, cannot afterward renounce it, but may be compelled to apply it to those purposes.⁸

1 *Matter of Howe*, 1 *Palge*, 214; *Farmers' Loan etc. Co. v. Carroll*, 5 *Barb.* 613; *Sloan v. McConahy*, 4 *Ohio*, 157.

2 *Trustees etc. v. Peaslee*, 15 *N. H.* 317; *Chapin v. School District*, 36 *Id.* 445; *Jackson v. Hartwell*, 8 *Johns.* 422.

3 *Vidal v. Girard*, 2 *How.* 127; *Greene v. Dennis*, 6 *Conn.* 293, 304; *First Cong. Soc. v. Atwater*, 23 *Id.* 34; *First Parish etc. v. Cole*, 3 *Pick.* 232, 237; *Trustees etc. v. King*, 12 *Mass.* 546, 553; *Bethlehem Borough v. Perseverance Fire Co.* 81 *Pa. St.* 445; *Mayor etc. v. Elliott*, 3 *Rawle*, 170; *Wade v. American Colonization Soc.* 7 *Smedes & M.* 697; and see *Farmers' Loan etc. Co. v. Harmony etc. Ins. Co.* 51 *Barb.* 33.

4 *Matter of Howe*, 1 *Palge*, 214; and see *Ayres v. M. E. Church*, 3 *Sand.* 351.

5 *Vidal v. Girard*, 2 *How.* 127.

6 *Chapin v. School District*, 36 *N. H.* 445; *Bliss v. American Bible Soc.* 2 *Allen*, 334; *Mason v. M. E. Church*, 27 *N. J. Eq.* 47; *Montpelier v. East Montpelier*, 29 *Vt.* 12.

7 *Chambers v. Baptist etc. Soc.* 1 *B. Mon.* 215; and see *Hadden v. Chorn*, 8 *Id.* 70; *Van Houten v. First Reformed Dutch Church*, 17 *N. J. Eq.* 136; *First Cong. Soc. v. Trustees etc.* 19 *Pick.* 492; *University of London v. Yarrow*, 23 *Beav.* 159; *Thornton v. Howe*, 31 *Id.* 14; *Shore v. Wilson*, 9 *Clark & F.* 355.

8 *American Academy v. Harvard College*, 12 *Gray*, 582; and see *Drury v. Inhabitants etc.* 10 *Allen*, 169.

§ 52. **Bequests to corporations.**—In the absence of any statutory restrictions, corporations may take bequests of personal property the same as individuals;¹ and a bequest to a corporation of its own stock is valid.² A bequest to a corporation in trust for particular objects within the scope of its corporate duties is good.³ And a bequest,

generally, to an unincorporated association capable of clear identification, is valid.⁴ If the beneficiary is defectively described, parol evidence is admissible, to point the language of the will, and show what society or corporation was intended by the testator.⁵ Generally, in this country, courts of equity assume jurisdiction over bequests to charitable uses.⁶

1 *McCartee v. Orph. Asyl. Soc.* 9 Cowen, 437; *Trustees etc. v. King*, 12 Mass. 546; *Dutch Church v. Brandow*, 53 Barb. 228; *New York Institution etc. v. How*, 10 N. Y. 84.

2 *Rivanna Nav. Co. v. Dawson*, 3 Gratt. 19.

3 *Mayor etc. v. Elliott*, 3 Rawle, 170; and see *Shotwell v. Mott*, 2 Sand. Ch. 46; *Witman v. Lex*, 17 Serg. & R. 83.

4 *Estate of Ticknor*, 13 Mich. 44; and see *Swasey v. American Bible Soc.* 9 Me. 823; *Preachers' Aid Soc. v. Rich*, 45 Id. 552; *Hamblett v. Bennett*, 6 Allen, 140; *Evangelical Assoc.'s Appeal*, 35 Pa. St. 315; *Burr v. Smith*, 7 Vt. 276; *Smith v. Nelson*, 18 Id. 511; *Cahill v. Bigger*, 8 B. Mon. 211; *Cory Universalist Soc. v. Beatty*, 27 N. J. Eq. 570. But compare *Owens v. Missionary Soc.* 14 N. Y. 380; *White v. Howard*, 46 Id. 144; *Goesle v. Bimeler*, 5 McLean, 223; *Sherwood v. Am. Bible Soc.* 4 Abb. Ct. App. 227; *State v. Warren*, 28 Md. 338.

5 *Hornbeck v. Am. Bible Soc.* 2 Sand. Ch. 133; and see *General Lying-in Hospital v. Knight*, 11 Eng. L. & Eq. 191; *Winslow v. Cummings*, 3 Cush. 353; *Banks v. Phelan*, 4 Barb. 80.

6 See *Carter v. Belfour*, 19 Ala. 814; *Williams v. Pearson*, 38 Id. 299; *Att.-Gen. v. Moore*, 4 C. E. Green, 503; *Miller v. Porter*, 53 Pa. St. 292; *Dutch Church v. Mott*, 7 Paige, 77; *Commissioners v. Rogers*, 55 Ind. 297. But compare *Ould v. Washington Hospital*, 95 U. S. 303; *Dashliell v. Att.-Gen.* 5 Har. & J. 392.

§ 53. **Devise to corporation.**—Where the statute of wills does not except bodies politic and corporate from its privileges, corporations are competent to take by devise under the words, "person or persons," and the like;¹ but where the statute excepts bodies corporate, as competent devisees, a provision in the charter conferring a right to take by "purchase" does not include a right to take by devise;² and so of a provision of the charter declaring the corporation to be capable of "taking, purchasing, holding, and conveying" real estate.³ And since the proceeds of realty are to be subject to the same rules as the realty itself,⁴ there is no power in a court of equity to convert real estate devised to a corporation incapable of taking in that way, into money, and to direct the payment

thereof to such devisee.⁵ A corporation having the general capacity to take land, except by devise, under the laws of the state by which it was created, may take and hold land in another state by devise of one of its own citizens.⁶ In case of doubt as to the identity of the corporation intended by the deviser, as the object of his bounty, resort may be had to extrinsic evidence.⁷ And the designation of a devisee by description, instead of by name, is as available in the case of a corporation as of a natural person.⁸

1 See *McDonough Will Case*, 15 How. 367; *Perin v. Carey*, 24 Id. 465; *Inhabitants etc. v. Cole*, 3 Pick. 232; *Chambers v. St. Louis*, 29 Mo. 543; *Girard v. Philadelphia*, 7 Wall. 114; § 4, *ante*.

2 *McCartee v. Orph. Asyl. Soc.* 9 Cowen, 437; *Canal Co. v. Railroad Co.* 4 Gill & J. 1.

3 *Theolog. Sem. v. Childs*, 4 Paige, 419. Compare *Downing v. Marshall*, 23 N. Y. 366.

4 *State v. Wiltbank*, 3 Har. (Del.) 18.

5 *Starkweather v. Am. Bible Soc.* 72 Ill. 50.

6 *Am. Bible Soc. v. Marshall*, 15 Ohio St. 537; *White v. Howard*, 38 Conn. 342; *Thompson v. Swoone*, 24 Pa. St. 474. But compare *Starkweather v. Am. Bible Soc.* 72 Ill. 50; *Boyce v. St. Louis*, 29 Barb. 650; *White v. Howard*, 46 N. Y. 144.

7 *Ayres v. Weed*, 16 Conn. 291; *Bodman v. Am. Tract Soc.* 9 Allen, 447.

8 *Brewster v. McCall*, 15 Conn. 274.

§ 54. Deeds by corporations.—As a general rule, deeds of conveyance by a corporation must be executed in the corporate name and under the corporate seal.¹ And a deed of lands of a corporation, executed by the president thereof in his own name, and under his own seal, is invalid.² If the mode in which the property of a corporation shall be disposed of is prescribed by the charter, that mode is to be pursued.³ If the previous consent of a majority of the legal voters is required, a conveyance without such consent is void.⁴ If deeds given by a corporation are required to be under the corporate seal, and to be signed by the corporators, a deed signed by persons not named therein as corporators, and bearing a seal not proved to be the corporate seal, is invalid.⁵ The

shareholders are not tenants in common of the land of the corporation, and a deed by them in their own names, not pursuant to a vote of the corporation, is not the deed of the corporation and cannot convey its land.⁶ Nor has the general agent of a corporation authority, as such, to transfer by deed its real estate.⁷ But an agent may be authorized by a vote of the stockholders to execute a deed for the corporation.⁸ A statute which, however, provides that a corporation may so authorize an agent to convey its real estate, does not exclude other modes of conveyance—as, for instance, conveyance through the regular officers of the corporation.⁹ And a deed executed by the corporate officers in their own names, by mistake, but intended as the deed of the corporation, may be reformed in equity.¹⁰ If no particular mode of acknowledging the deeds of corporations is directed by statute, and a deed is acknowledged by the officer who affixed the seal thereto, it is a sufficient compliance with general laws requiring a deed to be acknowledged by the “grantor.”¹¹ In case of an agreement by deed made with a corporation through a duly authorized agent, a delivery to and an acceptance of the deed by the agent is a delivery to and acceptance by the corporation.¹² A corporation aggregate never dies;¹³ hence, in grants to corporations aggregate, words of succession are not necessary to convey a fee simple.¹⁴

1 Hatch v. Barr, 1 Hamm. 390; and see *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543; *Hutchins v. Byrnes*, 9 Gray, 367; *Flint v. Clinton Co.* 12 N. H. 430; *Tenney v. East Warren Lumber Co.* 43 Id. 343.

2 Zoller v. Ide, 1 Neb. 439; Hatch v. Barr, 1 Hamm. 390; and see *Brinley v. Mann*, 2 Cush. 337. Compare *Isham v. Bennington Iron Co.* 19 Vt. 230; *Veasey v. Graham*, 17 Ga. 99.

3 See *McCracken v. San Francisco*, 16 Cal. 591; *Herzo v. San Francisco*, 33 Id. 164; *Hill v. Manchester etc. Water Works Co.* 5 Barn. & Adol. 866.

4 *Middleton Bank v. Dubuque*, 15 Iowa, 394; *Sill v. Lansingburg*, 16 Barb. 107; and see *Beckwith v. Windsor Manuf. Co.* 14 Conn. 594.

5 *Osborne v. Tunis*, 1 Dutch. 633.

6 *Isham v. Bennington Iron Co.* 19 Vt. 230; *Hill v. Manchester etc. Water Works Co.* 5 Barn. & Adol. 866.

7 *Stow v. Wyse*, 7 Conn. 214, 219.

8 *Burr v. McDonald*, 3 Gratt. 215; *Hopkins v. Gallatin Turnp. Co.* 4 Humph. 409.

⁹ *Morris v. Keil*, 20 Minn. 531; and see *Chouquette v. Barada*, 28 Mo. 491.

¹⁰ *West v. Agr. Board*, 82 Ill. 205.

¹¹ *Kelly v. Calhoun*, 95 U. S. 710.

¹² *Western R. R. Corp. v. Babcock*, 6 Met. 346.

¹³ *Wilcox v. Wheeler*, 47 N. H. 488.

¹⁴ *Wilcox v. Wheeler*, 47 N. H. 488; *Union Canal Co. v. Young*, 1 Whart. 425; *Overseer of Poor v. Sears*, 22 Pick. 122.

CHAPTER V.

BY-LAWS.

- § 55. Definition of, and power to make.
- § 56. In whom the power to make by-laws is vested.
- § 57. Validity of by-laws.
- § 58. By-laws must be reasonable.
- § 59. Construction and effect of by-laws.
- § 60. Enforcement of by-laws.
- § 61. Proof of by-laws.

§ 55. Definition of, and power to make.—A by-law is a rule or law of a corporation for its government.¹ And the power to make by-laws or private statutes, for its government and support, is incidental to the very existence of a corporation.² A corporate body, whether specially vested with the power of legislation or not, has inherently the power to make necessary rules for its government and operations.³ But authority to make by-laws does not include the power to legislate upon general subjects.⁴ The term "ordinance" is nearly equivalent in meaning to the term by-law, and is the word usually employed to denote the by-laws adopted by municipal corporations.⁵ The power to make by-laws is usually conferred in express terms, which imply a negative that the corporation shall not legislate in any other cases, nor for any other purposes than those specified.⁶ As it respects eleemosynary corporations, they have no incidental power of legislation, and the founder alone has a right to prescribe the regulations according to which his charity shall be applied.⁷

¹ *Drake v. Hudson River R. R. Co.* 7 Barb. 508.

² *City of London v. Vanacre*, 1 *Ld. Raym.* 496; *Dunston v. Imperial Gas Co.* 3 *Barn. & Adol.* 125; *Martin v. Nashville Build. Assoc.* 2 *Cold.* 418; *Kearney v. Andrews*, 2 *Stockt. Ch.* 70.

³ *Drake v. Hudson River R. R. Co.* 7 Barb. 508.

4 *Commonw. v. Turner*, 1 Cush. 493.

5 See *Dil. Mun. Corp.* § 244; *Gas. Co. v. San Francisco*, 6 Cal. 199; *St. Paul v. Coulter*, 12 Minn. 41; *Ashton v. Ellsworth*, 48 Ill. 299; *Blanchard v. Bissell*, 11 Ohio St. 96.

6 *Child v. Hudson's Bay Co.* 2 P. Wms. 207; *New Orleans v. Phillips*, 9 La. An. 44; *State v. Ferguson*, 3 N. H. 424; *State v. Morristown*, 33 N. J. L. 57.

7 *Phillips v. Berry*, 1 Ld. Raym. 8; *Reg. v. Dulwich College*, 8 Eng. L. & Eq. 385; *Phillips Academy v. King*, 12 Mass. 546.

§ 56. In whom the power to make by-laws is vested.—The power to make by-laws, in all corporations to which the power is incident by common law, resides in the members of the corporation at large,¹ where there is no law or usage to the contrary.² But where the power is in the body at large, they may delegate their rights to a select body, as the directors,³ which then becomes the representative of the whole community;⁴ and a majority of that body will constitute a quorum.⁵ Where the charter is silent as to the matter, a corporation may adopt by-laws as well by the acts and uniform course of proceedings of such corporations, as by an express vote or an adoption manifested in writing.⁶ And it is not necessary that the reasons for making a by-law should be stated in the preamble.⁷ But a corporation cannot enact a by-law, or any rule or resolution for its government, except within the state under whose laws it is organized and where it has a corporate existence.⁸ The same body in a corporation which has a power to make, has also the power to repeal by-laws.⁹ But where a by-law of a company empowers the directors to alter or amend the by-laws, they have no authority under said by-law or otherwise, to disregard or alter a by-law which was intended to impose a limitation on their powers.¹⁰

1 *Rex v. Westwood*, 7 Bing. 1; *Salem Bank v. Gloucester Bank*, 17 Mass. 129; *Union Bank of Md. v. Eldeley*, 1 Har. & G. 324.

2 *People v. Throop*, 12 Wend. 183; *Martin v. Nashville Build. Assoc.* 2 Cold. 332; *Morton Gravel Road Co. v. Wysong*, 51 Ind. 4.

3 *Ex parte Willcocks*, 7 Cowen, 402; *Rex v. Head*, 4 Burr. 2521.

4 *Rex v. Spencer*, 3 Burr. 1827.

5 *Cahill v. Kalamazoo Mut. Ins. Co.* 2 Doug. 124; *Ex parte Willcocks*, 7 Cowen, 402.

6 See *Langsdale v. Bouton*, 12 Ind. 467; *Dunston v. Imperial Gas Co.* 3 Barn. & Adol. 128; *Union Bank v. Ridgely*, 1 Har. & G. 324; *Fairfield Turnp. Co. v. Thorp*, 13 Conn. 173.

7 *Rex v. Harrison*, 3 Burr. 1322.

8 *Mitchell v. Copper Mining Co.* 8 Jones & S. 406; 67 N. Y. 280.

9 *Rex v. Westwood*, 7 Dowl. & R. 267; 4 Barn. & C. 781; *Rex v. Ashwell*, 12 East, 22; *Smith v. Nelson*, 18 Vt. 511.

10 *Stevens v. Davison*, 18 Gratt. 819.

§ 57. **Validity of by-laws.**—The power of a corporation to make by-laws is limited by the nature of the corporation and the laws of the country.¹ A corporation cannot enact by-laws contrary to the provisions of its charter;² and by-laws which are contrary to a law of the state,³ or to the constitutional law of the land,⁴ or to the general principles of the common law,⁵ are void.⁶ *Ex post facto* laws are no more lawful for corporations than for states;⁷ and many by-laws have been declared void, as in restraint of trade.⁸ But a by-law may be sustained in part, although one or more other parts are bad, if the good and bad clauses are capable of separation.⁹

1 *Sayre v. Louisville etc. Assoc.* 1 Duval, 143.

2 *Newling v. Francis*, 3 Term Rep. 189; *Karney v. Andrews*, 2 Stockt. Ch. 70; *Carr v. St. Louis*, 9 Mo. 191; *State v. Curtis*, 9 Nev. 325.

3 *Kennebec etc. R. R. Co.* 31 Me. 470; *Driscoll v. West etc. Manuf. Co.* 4 Jones & S. 488; and see *People v. Crossley*, 69 Ill. 186; *Evansville Nat. Bank v. Metrop. Nat. Bank*, 2 Biss. 527; *Bullard v. Bank*, 18 Wall. 589; *Conklin v. Second Nat. Bank*, 45 N. Y. 655.

4 *United States v. Hart*, 1 Peters C. C. 390; *People v. Crockett*, 9 Cal. 113; *Stuyvesant v. New York*, 7 Cowen, 588.

5 *Pulford v. Fire Department*, 31 Mich. 458; *Hayden v. Noyes*, 5 Conn. 391.

6 See *Mayor etc. v. Beasley*, 1 Humph. 232; *Adley v. Whitstable Co.* 17 Ves. 315; *Phillips v. Wickham*, 1 Palge, 590; *People v. Ben. Soc.* 2 Hun, 361; *Goaling v. Veley*, 12 Q. B. 347.

7 *Howard v. Savannah*, Charlt. 173; *Pulford v. Fire Departm.* 31 Mich. 458.

8 *Clark v. Lecren*, 9 Barn. & C. 52; *Heaketh v. Braddock*, 3 Burr. 1696; *Moore v. Bank of Commerce*, 63 Mo. 377; *Butchers' Beneficial Assoc.* 35 Pa. St. 151; *Sayre v. Louisville, etc. Assoc.* 1 Duval, 143. See *Mayor etc. v. Yulles*, 3 Ala. 137.

9 *Amesbury v. Bowditch Mut. Fire Ins. Co.* 6 Gray, 596; *Rogers v. Jones*, 1 Wend. 237; *Shelton v. Mayor etc.* 30 Ala. 540.

§ 58. **By-laws must be reasonable.**—The power to make by-laws is always subject to the restriction that such by-laws must be reasonable, and not oppressive, vex-

ations, or unequal.¹ And this rule applies as well to public as to private corporations.² Whether a by-law is reasonable or not is a question solely for the court.³ But a by-law, if unreasonable, will be bad, though duly passed, and published, and notified to the proper authorities, and not disallowed by them.⁴ A by-law is unreasonable, which, without authority, express, or to be clearly implied, interferes with the common rights of property, and the dealings of third persons, and prevents the purchase and transfer or delivery of property.⁵ Thus, a by-law of a bank prohibiting the alienation of stock therein, or putting restrictions thereon, is void.⁶ So, every citizen must be protected in his right to resort to the courts if he prefers, and a by-law of a merchants' exchange which requires members to submit their controversies to arbitration, on pain of expulsion if they bring suit, is invalid.⁷ A by-law of a benevolent association providing, as a penalty for the non-payment of dues, that the delinquent should forfeit his right to any benefits while in arrears, and for a period of three months after the payment of arrears, is invalid.⁸ So, a by-law compelling a freeman of a scrivener's company to provide a dinner for the master, warden, assistants, and other freemen, on the day of an election of a new master and wardens, was held to be bad;⁹ though in the case of an old corporation existing by prescription, an ancient custom or by-law, compelling the stewards of the corporation to give a customary feast, may be sustained.¹⁰ A by-law prescribing a reasonable initiation fee, suitable to defray the proper expenses of maintaining the corporation reputably, is good;¹¹ so of a by-law assessing on the members of the corporation a burden cast by law on the body politic.¹² A by-law of a corporation chartered to establish and maintain uniformity in insurance is valid; it is not contrary to public policy, nor in restraint of trade, nor unreasonable.¹³ So, by-laws adopted by the trustees of an asylum forbidding the inmates to leave the premises without permission from the

governor of the asylum, or one of his assistants, or indulging in contention, or boisterous and disorderly conversation at table, on pain of expulsion, are reasonable, proper, and valid.¹⁴ And a by-law of a chamber of commerce, providing for the expulsion of a member for non-compliance with the terms of any contract, whether verbal or written, is reasonable and valid,¹⁵ and may be enforced, although the contract violated was void by the statute of frauds, or as not made "during a season of change."¹⁶ Length of time will not legalize a by-law which is intrinsically illegal; but its long continuance is fair evidence to show that it has no intrinsic inconvenience.¹⁷

1 *People v. Crockett*, 9 Cal. 112; *Amesbury v. Ins. Co.* 6 Gray, 596; *Comm'rs etc. v. Gas Co.* 12 Pa. St. 318; *Kennebec etc. R. R. Co. v. Kendall*, 31 Me. 470; *Commonw. v. Gill*, 3 Whart. 228; *People v. Medical Soc.* 24 Barb. 570.

2 *Mayor v. Winfield*, 8 Humph. 767; *Dunham v. Rochester*, 5 Cowen, 462; *St. Louis v. Weber*, 44 Mo. 547; *Pedrick v. Bailey*, 12 Gray, 161.

3 *Commonw. v. Worcester*, 3 Pick. 462; *Vedder v. Fellows*, 20 N. Y. 126; *Queen v. Saddlers' Co.* 10 H. L. Cas. 404.

4 *Elwood v. Bullock*, 6 Q. B. 383.

5 *Driscoll v. West Bradley etc. Manuf. Co.* 59 N. Y. 96.

6 *Moore v. Bank of Commerce*, 52 Mo. 377.

7 *State v. Union Merchants' Exchange*, 2 Mo. App. 96.

8 *Cartan v. Father Matthew etc. Soc.* 3 Daly, 20; and see *Buecking v. Lodge of Odd Fellows*, 1 City Ct. Rep. (N. Y.) 51.

9 *Scriveners' Co. v. Brooking*, 3 Q. B. 95; 2 Gale & D. 419.

10 *Framework Knitters' Co. v. Green*, 1 Ld. Raym. 113; *Wallis' Case*, Cro. Jac. 555.

11 *Taverner's Case*, T. Raym. 446.

12 *Jeffrey's Case*, 5 Co. Rep. 66 a.

13 *People v. N. Y. Board of Underwriters*, 54 How. Pr. 240.

14 *People v. Sailors' Snug Harbor*, 54 Barb. 532.

15 *Dickenson v. Chamber of Commerce*, 29 Wis. 45.

16 *Dickenson v. Chamber of Commerce*, 29 Wis. 45.

17 *Rex v. Ashwell*, 12 East, 22.

§ 59. Construction and effect of by-laws.—In construing by-laws, the courts will interpret them reasonably;¹ and will not declare them invalid because every particular reason for them does not appear.² A by-law of a bank is a contract between the stockholders, and the ordinary rules of construing contracts apply in its

construction.³ The words "shall be lawful," when found in a by-law, are not to be construed as obligatory.⁴ A by-law of a beneficial society providing for the relief of diseased members on application to the stewards of the society, entitles a member to relief only from the date of his application.⁵ Where the charter or a statute empowers a corporation to pass such by-laws as are necessary, the "necessity" will be implied from the act of passing it, and the by-law need not recite that it was necessary.⁶ A corporation may, by prescription or statute, have a local jurisdiction, and its by-laws will be binding on those within its jurisdiction, whether strangers or members;⁷ but unless this be the case, the corporate power to prescribe by-laws extends only to its own members and officers.⁸ Over them its by-laws, duly and lawfully passed, are binding and obligatory;⁹ and it is no objection to being bound by a by-law, that a corporator had no notice of it,¹⁰ or that he was not a member of the corporation when the by-law was enacted.¹¹ A corporation cannot, by its by-laws, either abridge or enlarge the privileges conferred upon it or upon the corporators by statute.¹² Thus, where the power of electing the directors of a railroad corporation is, by the statutes of a state, lodged in the hands of the stockholders, the corporation cannot, by its by-laws, resolutions, or contracts, give or take it away.¹³

1 See *Vintners' Co. v. Passy*, 1 Burr. 235.

2 *Colchester v. Goodwin*, Cart. 119; *Poulsters' Co. v. Phillips*, 6 Blug. N. C. 314.

3 *Re Dunkerson*, 4 Biss. 227.

4 *Rex v. Balliffs etc.* 4 Barn. & Ald. 271; 2 Dowl. & R. 172.

5 *Breneman v. Franklin Benef. Assoc.* 3 Watts & S. 218.

6 *Stuyvesant v. Mayor, etc.* 7 Cowen, 588, 606.

7 *Rex v. College of Physicians*, 5 Burr. 2740; *Kirk v. Nowell*, 1 Term Rep. 118; *Marietta v. Fearing*, 5 Ohio, 427; *Vandine's Case*, 6 Pick. 187; 17 Am. Dec. 351.

8 *Company of Horners v. Barlow*, 3 Mod. 159; *Bank of Wilmington, v. Wollastou*, 3 Har. (Del.) 90; *Samuels v. Cent. etc. Exp. Co. McCahon*, 214.

9 *Cummings v. Webster*, 43 Me. 192; *Anacosta Tribe v. Murbach*, 12 Md. 91; *German Evan. Cong. v. Pressler*, 17 La. An. 127; *McDermott v. Board of Police*, 5 Abb. Pr. 423; *Sassenscheidt v. Ben. etc. Union*, 1 City Ct. Rep. (N. Y.) 8.

10 *Susquehannah Ins. Co. v. Perrine*, 7 Watts & S. 348; and see *Treadway v. Hamilton etc. Ins. Co.* 29 Conn. 68.

11 *London v. Vanacre*, 12 Mod. 273; *Cudden v. Estwick*, 6 Id. 124; *Susquehannah Ins. Co. v. Perrine*, 7 Watts & S. 348.

12 *Brewster v. Hartley*, 37 Cal. 15; *Andrews v. Union etc. Ins. Co.* 37 Mo. 256; and see *Great Falls etc. Ins. Co. v. Harvey*, 45 N. H. 292.

13 *Brewster v. Hartley*, 37 Cal. 15.

§ 60. **Enforcement of by-laws.**—The power to make supposes the power to enforce by-laws, by pecuniary penalties, which must be proportioned to the offense.¹ The penalty must be a sum certain, and cannot be left to the arbitrary assessment of the governing part of the corporation, upon the circumstances of the particular case.² And where the amount of the penalty is fixed by the charter, a by-law, the penalty of which exceeds that amount, is void.³ A corporation having authority to enforce its by-laws by fine, is impliedly precluded from adopting any other method.⁴ And without an express power so to do, a corporation cannot imprison the offender,⁵ or impose a forfeiture of goods, as a punishment for the violation of a by-law.⁶ And a by-law which compels the payment of a penalty, by excluding the offender from all participation in the profits of the company until payment, is bad.⁷ A by-law cannot be enforced by disfranchising the offender;⁸ nor by avoiding any bond or covenant made in contravention of it.⁹ And a refusal to pay a fine imposed by a by-law for a failure to pay an installment when due, does not give the right to impose additional fines for the same default.¹⁰ As a general rule, the penalty of a by-law can be given only to the corporation injured by the offense against its regulations.¹¹ The usual mode of enforcing the penalty is by an action of debt or assumpsit for its recovery,¹² and the corporation itself must bring the action.¹³ Since the office of a by-law is to regulate the duties of members toward the corporation and among themselves, a third party can enforce them only when he shows some privity;¹⁴ as, where his claim is for value advanced upon

the credit of the by-law and the signature thereto, or the like.¹⁵

1 *City of London's Case*, 8 Co. Rep. 233; *Mayor etc. of Mobile v. Yulle*, 3 Ala. 137; *Tobacco Pipe etc. Co. v. Woodroffe*, 7 Barn. & C. 530; and see *Piper v. Chappell*, 14 Mees. & W. 624.

2 *Wood v. Searle*, 3 Leon. 8; *J. Bridg.* 141; *Mayor etc. v. Yulle*, 3 Ala. 137; but see *Mayor etc. v. Phelps*, 27 *id.* 55.

3 *McMullen v. City of Charleston*, 1 Bay, 382; *Mayor etc. v. Ordrenan*, 13 Joins. 122.

4 *Kirk v. Nowell*, 1 Term Rep. 125; and see *Nightingale v. Bridges*, 1 Show. 17; *Haise v. Town Council*, 6 Rich. 404; *Miles v. Chamberlain*, 17 Wis. 448.

5 *London v. Wood*, 12 Mod. 696; *Hart v. Mayor of Albany*, 9 Wend. 571; *Barter v. Commonw.* 3 Penn. & W. 253; *Ex parte Burnett*, 20 Ala. 461.

6 *Cotter v. Dorr*, 5 Ohio. 335; *Kirk v. Nowell*, 1 Term Rep. 118; *Hart v. Mayor etc.* 9 Wend. 571; *Phillips v. Allen*, 41 Pa. St. 481.

7 *Adley v. Reeves*, 2 Maule & S. 53.

8 *Rex v. London*, 2 Lev. 201; but see *Bab v. Clarke*, F. Moore, 412.

9 *Doggerell v. Pokes*, F. Moore, 411.

10 *Pentz v. Fire Ins. Co.* 35 Md. 73.

11 *London v. Wood*, 12 Mod. 696.

12 *Woolley v. Idle*, 4 Burr. 1551; *Feltmakers v. Davis*, 1 Bos. & P. 93.

13 *Totterdell v. Glazby*, 2 Wils. 266; and see *Graves v. Colby*, 9 Ad. & E. 336; *Piper v. Chappell*, 14 Mees. & W. 624.

14 *Anacosta Tribe v. Murbach*, 13 Md. 91.

15 *Flint v. Pierce*, 99 Mass. 68; and see *Trustees etc. v. Flint*, 13 Met. 543.

§ 61. Proof of by-laws.—It is in general necessary to produce the by-laws, in order to prove what they are;¹ and parol testimony of their contents, though offered by an officer of the corporation, is incompetent.² The adoption of by-laws may, however, be sometimes proved by implication;³ and ancient and unvaried usage has been accepted as evidence of a by-law.⁴ Evidence of the custom of doing business in a union-store association was admitted, to show consent to, or acquiescence in, an actual change or modification of their by-laws.⁵ A member of a corporation is presumed to know its by-laws;⁶ and the by-laws of a corporation are evidence against its officers, though they be not corporators.⁷

1 *Lumbard v. Aldrich*, 8 N. H. 35.

2 *Lumbard v. Aldrich*, 8 N. H. 35; and see *Sells v. Brown*, 9 Car. & P. 661.

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- 3 Union Bank v. Ridgely, 1 Har. & G. 324.
- 4 Rex v. Miller, 6 Term Rep. 230; Rex v. Westwood, 4 Barn. & C. 786; and see Taylor v. Griswold, 2 Green C. E. 223; Herzog v. San Francisco, 33 Cal. 134.
- 5 Henry v. Jackson, 37 Vt. 431.
- 6 Inhabitants etc. v. Morton, 25 Mo. 563; Buffalo v. Webster, 16 Wend. 99.
- 7 Bank of Wilmington etc. v. Wollaston, 3 Har. (Del.) 90.

CHAPTER VI.

MEETINGS AND ELECTIONS.

- § 62. Object and nature of meetings.
- § 63. Necessity of notice.
- § 64. Requisites of notices.
- § 65. The voice of the majority controls.
- § 66. Meetings held outside the corporate domicile.
- § 67. Mode of conducting elections.
- § 68. Time and place of holding elections.
- § 69. Who may vote at elections.
- § 70. Validity of elections.
- § 71. Presumptions bearing on elections.

§ 62. Object and nature of meetings.—In general, a corporation can transact its business and manifest its wishes only by and through the individuals composing it; hence, the necessity for meetings of the members, from time to time, for the different purposes connected with the corporation.¹ A distinction is made between general stated meetings of a corporation and special meetings.² The former occur at stated times and places, as usually fixed by the constitution or by-laws of the body, and are held for the consideration of matters in general. The latter are called upon emergencies, or on particular occasions, and for special purposes.³

¹ See *City of Baltimore v. Pontney*, 25 Md. 18; *Dey v. Jersey City*, 19 N. J. Eq. 412; *Mayor etc. v. Simpson*, 8 Q. B. 73.

² *Warner v. Mower*, 11 Vt. 335.

³ *Warner v. Mower*, 11 Vt. 335; and see *Zabriskie v. Cleveland etc. R. R. Co.* 23 How. 381; *Cutbill v. Kingdom*, 1 Ex. 494.

§ 63. Necessity of notice.—In the absence of any provision, express or implied, to the contrary, every member has a right to be present at all meetings of the corporate body, and must, in some manner, be notified to attend the same.¹ And the omission to give the required

notice, though accidental,² will generally invalidate the proceedings at the meeting.³ Even the absence of a member from home will not excuse the want of notice;⁴ but a meeting may be legally held, although a member is incapable, from mental imbecility, of receiving a notice thereof.⁵ And the pledgee of stock is not to such an extent regarded as the owner, as to be entitled to notice;⁶ so, the want of notice may be waived, as, where all who are entitled to be present at a meeting, are actually present, whether with or without notice, and do not object to the same on the ground of informality;⁷ but if any one person having a right to attend, is absent, or refuses his consent, the proceedings are illegal.⁸ A person not present and who did not receive notice, may, nevertheless, bind himself by subsequent acquiescence in the proceedings of a meeting.⁹ In some cases proper notice is presumed; thus, where a part only of the directors attend a meeting and transact business, it need not appear that the absent directors had notice. If the contrary do not appear, the legal presumption is that they had notice.¹⁰ Dates in ancient records of a town are presumed to have been regularly passed, though no record of a warrant or notice is found.¹¹

¹ *State v. Ferguson*, 31 N. J. L. 107; *People v. Bachelor*, 22 N. Y. 128; *Smyth v. Darley*, 2 H. L. Cas. 789.

² *Rex v. Laughton*, 4 Ad. & E. 538.

³ *Rex v. Cherwynd*, 7 Barn. & C. 695; and see *San Buenaventura etc. Manuf. Co. v. Vassalt*, 59 Cal. 544; *People v. Albany etc. R. R. Co.*, 38 How. Pr. 223; *S. C.* 59 Barb. 314; 7 Abb. Pr. N. S. 285.

⁴ *Jackson v. Hampden*, 20 Me. 37.

⁵ *Stebbins v. Merritt*, 10 Cush. 27.

⁶ *McDaniels v. Flower Brook Manuf. Co.* 22 Vt. 274.

⁷ *Re British Sug. Refining Co.* 3 Kay & J. 408; 26 L. J. (Ch.) 369; *Jones v. Milton etc. Co.* 7 Ind. 547; *People v. Peck*, 11 Wend. 604; and see *Bryant v. Goodnow*, 5 Pick. 228.

⁸ *People's Ins. Co. v. Westcott*, 11 Gray, 440.

⁹ *Smallcombe v. Evans*, Law R. 3 H. L. 249; *Turquand v. Marshall*, Law R. 4 Ch. 376; *Samuel v. Holladay*, Woolw. 400; and see *Phosphate Co. v. Green*, Law R. 7 Com. P. 43; *Ramsey v. Erie Railw. Co.* 38 How. Pr. 193; *S. C.* 7 Abb. Pr. N. S. 154.

¹⁰ *Sargent v. Webster*, 13 Met. 497; *Lane v. Drainerd*, 30 Conn. 343;

and see *Citizens etc. Ins. Co. v. Sortwell*, 8 Allen, 217; *Chamberlain v. Painesville etc. R. R. Co.* 15 Ohio St. 225.

11 *Willey v. Portsmouth*, 35 N. H. 303.

§ 64. Requisites of notice.—In the absence of any provision on the subject, meetings must be called by a personal notice;¹ which should be in writing, and signed by the proper person having authority to assemble the corporation;² so, it should state the time³ and place⁴ of meeting, unless these be established by some standing rule or general custom known to the members;⁵ and it should state the business to be transacted, except in the case of stated general meetings, and meetings regularly held for a particular object.⁶ The members of a corporate body are presumed to have notice of the time of its stated meetings, and are bound by the proceedings at them;⁷ but notice of extraordinary meetings should specify the occasion of the summons, and the business proposed to be transacted.⁸ So, an absent member is not presumed to know all which takes place at a stated meeting, so as to be charged with notice of anything there transacted, contemplating future action at a time other than that of a stated meeting, and notice should be given;⁹ but the rule is otherwise as it respects an adjourned meeting held in continuation of a prior one, and for the purpose of completing its unfinished business.¹⁰ If there be no provision as to the length of time prior to the meeting requisite for notice, a reasonable time is required, or the usual time, if regulated by custom.¹¹ Under a statute requiring a general meeting of every company once in every year, the word "year" is construed to mean the period commencing on the 1st of January and ending on the 31st of December, and not the period of twelve months from the registration of a company.¹² In New York, the holding of meetings of a benevolent society for the transaction of its business, on Sunday, is not forbidden as illegal;¹³ and if a member attends a regular meeting so held on Sunday, and is there served with a notice to attend the

next meeting, it does not rest with him to make the objection.¹⁴ Where the charter of a joint-stock corporation prescribes the mode of giving notice of the time and place of holding meetings of stockholders, that mode must be pursued, or the notice will be ineffectual;¹⁵ and if the by-laws provide that meetings of the stockholders shall be called by the trustees, the board of trustees must act, in order to convene a legal meeting.¹⁶

1 Wiggin v. Freewill Baptist Church, 8 Met. 301; Stow v. Wyse, 7 Conn. 214; Stevens v. Eden Meeting House Soc. 12 Vt. 638; and see Harding v. Vandewater, 40 Cal. 77.

2 Congregational Society of Bethany v. Sperry, 10 Conn. 200; Jones v. Milton etc. Co. 7 Ind. 647; Hardenburg v. Farmers' etc. Bank, 3 N. J. Eq. 68; Johnston v. Jones, 23 Id. 218; Evans v. Osgood, 18 Me. 213; and see Goulding v. Clark, 34 N. H. 148; Stebbins v. Merritt, 10 Cush. 27.

3 People v. Bachelor, 22 N. Y. 123.

4 Jones v. Milton etc. Co. 7 Ind. 647; Rex v. May, 5 Burr. 2681.

5 Rex v. Hill, 4 Barn. & C. 426; Atlantic Ins. Co. v. Sanders, 36 N. H. 252; and see Re Irrigation Co. Law R. 6 Ch. 176; Graham v. Van Diemen's Land Co. 1 Hurl. & N. 641.

6 Merritt v. Farris, 22 Ill. 203; Warner v. Mower, 11 Vt. 385; Sampson v. Bowdoinham Steam Mill Co. 36 Me. 78.

7 People v. Bachelor, 22 N. Y. 123; and see Lane v. Brainerd, 30 Conn. 565.

8 People's Ins. Co. v. Westcott, 14 Gray, 440; Atlantic Delaine Co. v. Mason, 5 R. I. 463; Savings Bank v. Davis, 8 Conn. 191; Re Bridport Old Brewery Co. Law R. 2 Ch. 191.

9 People v. Bachelor, 23 Barb. 310; 22 N. Y. 123; and see Ex parte Johnson, 31 Eng. L. & Eq. 430.

10 Scadding v. Lorant, 3 H. L. Cas. 418; 5 Eng. L. & Eq. 16; People v. Bachelor, 35 Barb. 310; 22 N. Y. 123; and see Smith v. Law, 21 Id. 256; Warren v. Mower, 11 Vt. 385; People v. Common Council of Rochester, 5 Laus. 142; Kimball v. Marshall, 44 N. H. 468.

11 In re Long Island R. R. Co. 19 Wend. 37; Rex v. Hill, 4 Barn. & C. 426, 442.

12 Gibson v. Barton, Law R. 10 Q. B. 329.

13 People v. Young Men's etc. Ben. Soc. 65 Barb. 357; and see Merritt v. Earle, 31 Id. 38.

14 People v. Young Men's etc. Ben. Soc. 65 Barb. 357.

15 Shelby R. R. Co. v. Louisville etc. R. R. Co. 12 Bu. h. 62.

16 State v. Pettinell, 10 Nev. 141.

§ 65. The voice of the majority controls.—When the charter or constitution of the corporation is silent as to the matter, it is the general rule that, within the scope of the corporate affairs,¹ the acts of a majority are binding on the whole.² The individual who becomes a member

of the corporation assents beforehand to all measures that shall be sanctioned by a majority of the voices;³ nor is it necessary that the number present at a lawful meeting be a majority of the whole number of members.⁴ A majority of those who appear may act, and their action will bind all, if performed in good faith, and within the purpose of the corporation.⁵ But this doctrine applies only where an act is to be done by an indefinite body, as the whole body of the corporators;⁶ and where an act is to be done by a select and definite body, as a board of directors, a majority of the number is necessary to constitute a legal meeting,⁷ although if a quorum is present, a majority of the quorum may act.⁸ Thus, if there are twelve directors, and seven attend a meeting, a resolution adopted by a vote of four is presumably binding.⁹

1 *Columbia etc. Co. v. Meier*, 39 Mo. 53; *Dudley v. Kentucky High School*, 9 Bush, 576; *Thompson v. Erie Railw. Co.* 11 Abb. Pr. N. S. 188; *Gray v. Lewis*, Law R. 8 Eq. 526; *Kent v. Jackson*, 2 De Gex M. & G. 49.

2 *East Tenn. etc. R. R. Co. v. Gammon*, 5 Sneed, 567; *Lanman v. Lebanon Valley R. R. Co.* 30 Pa. St. 42; *Troy etc. R. R. Co. v. Kerr*, 17 Barb. 581; *Mowrey v. Indiana etc. R. R. Co.* 4 Blas. 78; *Eggleston v. Doolittle*, 33 Conn. 396, 402.

3 *St. Mary's Church*, 7 Serg. & R. 517.

4 *Ex parte Willcocks*, 7 Cowen, 402, 410 n; *Madison Av. Baptist v. Baptist Church in Oliver St.* 5 Robt. 649.

5 *Treadwell v. Salisbury Manuf. Co.* 7 Gray, 393; *Faulds v. Yates*, 57 Ill. 416; *S. C. 11 Am. R.* 24; *Gregory v. Patchett*, 33 Beav. 595; *Brewer v. Boston Theater*, 104 Mass. 378.

6 See *Horton v. Baptist Church*, 34 Vt. 316; *State v. Binder*, 38 Mo. 450; *Presbyterian Cong. v. Johns*, 27 Miss. 517.

7 *Buell v. Buckingham*, 16 Iowa, 284; *Field v. Field*, 9 Wend. 394; *Rex v. Miller*, 6 Term Rep. 268; *Blacket v. Blizzard*, 9 Barn. & C. 851.

8 *Booker v. Young*, 12 Gratt. 303; *Edgerly v. Emerson*, 23 N. H. 555; *Price v. Grand Rapids etc. R. R. Co.* 13 Ind. 58.

9 See *Lockwood v. Mechanics' Nat. Bank*, 9 R. I. 306; *Wells v. Rahway White Rubber Co.* 19 N. J. Eq. 402.

§ 66. Meetings held outside the corporate domicile.—A corporation exists only within the territory of the jurisdiction that created it, and it cannot act strictly in a corporate capacity outside that territory.¹ All proceedings had by the body of the corporation, while sitting without the bounds of the state which creates it, are void

and of no effect.² But the directors of a corporation, as the agents thereof,³ may meet and act outside of the chartering state, and their proceedings will be valid and binding upon the corporation.⁴ And a corporation which is the creature of the concurrent legislation of two states may lawfully hold its meetings and transact its corporate business in either state.⁵

1 Bank of Augusta v. Earle, 13 Peters, 519, 533; Paul v. Virginia, 8 Wall, 163.

2 Miller v. Ewer, 27 Me. 517; Freeman v. Machias etc. Mill Co. 38 Id. 343; Aspinwall v. Ohio etc. R. R. Co. 20 Ind. 497; Wood Hydraulic Co. v. King, 45 Ga. 34.

3 Galveston R. R. Co. v. Cowdrey, 11 Wall. 459, 476; Balt. etc. R. R. Co. v. Glenn, 23 Md. 237; Bank of Augusta v. Earle, 13 Peters, 519, 533.

4 Arms v. Conant, 36 Vt. 745; Ohio etc. R. R. Co. v. McPherson, 35 Mo. 13; McCall v. Byram Manuf. Co. 6 Conn. 423; Bellows v. Todd, 39 Iowa, 207; Smith v. Alvord, 63 Barb. 415; Newburg Petroleum Co. v. Weare, 27 Ohio St. 343.

5 Covington etc. Bridge Co. v. Mayer, 31 Ohio St. 317. See Ohio etc. R. R. Co. v. Wheeler, 1 Black, 286; Sprague v. Hartford etc. R. R. Co. 5 R. I. 233.

§ 67. **Mode of conducting elections.**—The election of suitable officers or agents for the government of the affairs of the corporation, and the conduct of its business through the agency of such, pertain to the nature and condition of corporations aggregate, without being expressly conferred by the act of incorporation.¹ And if the time and mode of election are not fixed by charter or prescription, it is competent for the corporate body to make regulations respecting them.² So, in case of an emergency in which the mode prescribed by the charter fails to accomplish the purposes intended, and the necessary offices are vacant, the corporators may exercise the power of election, and provide for the appointment of inspectors for that purpose.³ The power of election may be reposed in a board of directors, or other select body;⁴ if not so expressly lodged in other hands, it is to be exercised by the body at large;⁵ or, if consistent with the charter, the body at large may delegate the power of election to a select body, created by a by-law.⁶ In corpo-

rations aggregate, the principle of an election is a majority, unless otherwise specified.⁷ But after an election has been properly proposed, whoever has a majority of those who vote, the assembly being sufficient, is elected, although the majority of the entire assembly wholly abstain from voting.⁸ An adjournment during the process of balloting will not invalidate the election of a board of directors.⁹

1 Hughes v. Parker, 20 N. H. 58; Low v. Commissioners etc. R. M. Charit. 302.

2 Newling v. Francis, 3 Term Rep. 189; Juker v. Commonw. 20 Pa. St. 484.

3 Matter of Wheeler, 2 Abb. Pr. N. S. 361.

4 Commonw. v. Gill, 3 Whart. 228.

5 Commonw. v. Bonsall, 3 Whart. 560; State v. Aucker, 2 Rich. 244.

6 Ex parte Willcocks, 7 Cowen, 402; 17 Am. Dec. 525; and see Commonw. v. Woelper, 3 Serg. & R. 29; 8 Am. Dec. 628.

7 Horton v. Baptist Church, 34 Vt. 316; State v. Wilmington City Council, 3 Har. (Del.) 294.

8 Oldknow v. Wainwright, 2 Burr. 1017; and see Rex. v. Miller, 6 Term Rep. 268; Booker v. Young, 12 Gratt. 303; Duell v. Buckingham, 16 Iowa, 244; Everett v. Smith, 22 Minn. 53; but see Commonw. v. Wickersham, 68 Pa. St. 134.

9 Penobscot etc. R. R. Co. v. Dunn, 39 Me. 587; and see Matter of Chenango Mut. Ins. Co. 19 Wend. 635.

§ 68. Time and place of holding election.—Many of the details as to the mode of conducting elections are regarded as directory,¹ and the mere failure of an electoral body to proceed as directed does not exhaust its power of election.² Even the time mentioned is a directory provision, the omission to pursue which is not fatal.³ But when the charter directs that all elections of directors after the first shall be held annually, at such times as the by-laws shall direct, no second election can be held until by-laws designating the time have been adopted.⁴ If the directors are empowered to designate the time for holding an election, the designation must be made by the board when lawfully convened.⁵ When the usual place of meeting has been changed, an election of officers at the old place is invalid.⁶

1 *Dickey v. Hurlburt*, 5 Cal. 343; *People v. Albany etc. R. R. Co.* 7 Abb. Pr. N. S. 265; S. C. 38 How. Pr. 228; 55 Barb. 344; *Gase v. State*, 34 Ind. 423; *Hughes v. Parker*, 20 N. H. 53; *Downing v. Potts*, 3 Zab. 68; *Thames Haven Dock etc. Co.* 4 Man. & G. 553; 3 Eng. Railw. Cas. 177.

2 *Jacobs v. Murray*, 15 Cal. 221; *State v. Young*, 51 id. 149.

3 *Jacobs v. Murray*, 15 Cal. 221; and see *People v. Runkle*, 9 Johns. 147; *Rex v. Poole*, 7 Mod. 195; *People v. Fairbury*, 51 Ill. 149; *Comm'rs v. McDaniel*, 7 Jones, (N. C.) 107.

4 *Johnston v. Jones*, 23 N. J. Eq. 216; see *Hughes v. Parker*, 19 N. H. 181.

5 *Johnston v. Jones*, 23 N. J. Eq. 216.

6 *Miller v. English*, 1 Zab. 317; and see *Commonw. v. Comm'rs*, 5 Rawle, 75; *People v. Knight*, 13 Mich. 424.

§ 69. Who may vote at elections.—When the qualifications of persons who may vote for corporate officers are definitely prescribed by statute, the corporation cannot extend or abridge the right to vote.¹ No additional qualification can be imposed by by-laws.² The mere owning of shares in the stock of a moneyed corporation gives a right to vote;³ and the owner need not have a certificate of the stock to entitle him to exercise the right.⁴ So, a subscriber to stock, to whom regular certificates thereof have been issued, may vote, although he has paid nothing for his stock.⁵ The right to vote upon shares is in the person in whose name, as apparent owner, they stand upon the books of the corporation.⁶ If the right to vote is disputed, the books of the corporation are *prima facie* evidence as to who possesses that right.⁷ Any transfer of stock sufficient to pass the property is sufficient to entitle the transferee to vote, unless some specific mode of transfer is made necessary by statute or a by-law.⁸ Administrators of a stockholder who dies intestate, have the right to vote at election of directors, without any formal transfer of the stock on the books of the company.⁹ A person has a right to vote on stock standing in his name as trustee for another;¹⁰ and in a clear case of hypothecation, the pledgor may vote;¹¹ so, the mortgagor of stock in a corporation, until foreclosure and sale, is entitled to vote upon the stock at elections.¹² But where stock is held by an individual as trustee for the corporation, such trustee

cannot vote upon it.¹² A corporation cannot, either directly or through the intervention of a trustee, be a "stockholder" of its own capital stock.¹⁴ Stockholders who are not such on the day an election is held, cannot vote, although they were stockholders on the day the election should have been held.¹⁵ The right to vote by proxy does not exist at common law;¹⁶ and it requires legislative sanction before any corporation can make a valid by-law authorizing members so to vote.¹⁷ And where, by the terms of incorporation, the right to vote by proxy is given to each stockholder, being a citizen, an alien is excluded.¹⁸ But under the charter of a religious corporation, which made no mention of citizen or subject, aliens, who were otherwise qualified, were permitted to vote at an election of officers.¹⁹

1 Brewster v. Hartley, 37 Cal. 15; People v. Phillips, 1 Denio, 338; and see Rex v. Head, 4 Burr. 2515.

2 People v. Phillips, 1 Denio, 338; Taylor v. Griswold, 2 Green, 222.

3 See Schaeffer v. Missouri etc. Ins. Co. 46 Mo. 248; State v. Tudor, 5 Day, 329; Mills v. Stewart, 41 N. Y. 384.

4 Beckett v. Houston, 32 Ind. 392; and see Chester Glass Co. v. Dewey, 15 Mass. 94.

5 Downing v. Potts, 3 Zab. 66; see Highland Turnp. Co. v. McKean, 11 Johns. 98; Matter of Wheeler, 2 Abb. Fr. N. S. 261.

6 State v. Ferris, 42 Conn. 560.

7 Hoppin v. Buffum, 9 R. I. 513; and see Bank of Commerce's Appeal, 73 Pa. St. 539; Schoharie Valley R. R. Case, 12 Abb. Fr. N. S. 334; Mousseaux v. Urquhart, 19 La. An. 482; Downing v. Potts, 3 Zab. 66.

8 People v. Devin, 17 Ill. 84;—see Salisbury Mills v. Townsend, 109 Mass. 115.

9 Matter of North Shore etc. Ferry Co. 63 Barb. 556.

10 Matter of Barker, 6 Wend. 509; Wilson v. Proprietors of Central Bridge, 9 R. I. 590.

11 Ex parte Willcocks, 7 Cowen, 402; 17 Am. Dec. 525; and see Scholfield v. Union Bank, 2 Cranch C. C. 115.

12 Dowell v. Thompson, 3 Cranch C. C. 423.

13 American Railw. etc. Co. v. Haven, 101 Mass. 396; ex parte Holmes, 5 Comp. 426; Mousseaux v. Urquhart, 19 La. An. 482.

14 Brewster v. Hartley, 37 Cal. 15. Compare § 107, post.

15 Johnston v. Jones, 23 N. J. Eq. 216.

16 Taylor v. Griswold, 2 Green, 223; People v. Twaddell, 18 Hun, 427; and see Phillips v. Wickham, 1 Paige, 590. Compare State v. Tudor, 5 Day, 329; 5 Am. Dec. 162.

17 Phillips v. Wickham, 1 Paige, 590.

18 Matter of Barker, 6 Wend. 509.

19 *Commonw. v. Woelper*, 3 Serg. & R. 29; 8 Am. Dec. 626; see also *Stewart v. Foster*, 2 Binn. 120; *Cannmeyer v. United Churches*, 2 Sand. Ch. 188.

§ 70. Validity of elections.—Unless the charter declares it void, an irregular election is voidable only, and not actually void.¹ If no particular mode of proceeding is prescribed by law, an election conducted in good faith ought not to be set aside for mere informality.² Where there was actual notice, and in the absence of fraud or surprise, the neglect of an officer to perform a merely ministerial act will not defeat an election.³ Thus, an election of directors is not invalid or to be set aside as irregular, because the oath actually administered to them was not subscribed by them.⁴ Nor is an election of trustees invalidated by the neglect or delay of the inspectors to give the proper certificate.⁵ Nor is an election rendered invalid by the fact that the inspectors kept the polls open longer than the time fixed by the notice, it appearing to have been done for the purpose of enabling stockholders present and offering to vote, to do so.⁶ But election means due election, and a merely colorable and elusive election is absolutely null and void.⁷ So, an election may be held void on the ground of a preconceived scheme, combination, or conspiracy to carry the election by the use and abuse of legal process and proceedings.⁸ But a combination among members owning a majority of the stock of a corporation, to secure the board of directors and the management of the corporate property, is not necessarily void, as against public policy.⁹ If the list of stockholders exhibited and acted upon on the day of election was a false list, and was known to be false by the parties who exhibited it, the election is not legal.¹⁰ But the reception of illegal votes does not alone vitiate an election;¹¹ it must affirmatively appear, in order to avoid the election, that the wrongful action changed the result of the election.¹²

1 *Crawford v. Powell*. 2 *Burr*, 1013; *Rex v. Bridge*, 1 *Maule & S* 76; and see *Trustees etc. v. Hills*, 6 *Cowen*, 23.

2 Phillips v. Wickham, 1 Paige, 590; Hardenbergh v. Farmers etc. Bank, 2 Green, 68; Rex v. Thetford, 8 East, 270.

3 Gorham v. Campbell, 2 Cal. 135.

4 Matter of Wheeler, 2 Abb. Pr. N. S. 361.

5 People v. Peck, 11 Wend. 604.

6 People v. Albany etc. R. R. Co. 7 Abb. Pr. N. S. 265; 55 Barb. 244; 1 Lana. 308; 38 How. Pr. 228; Matter of Mohawk etc. R. R. Co. 19 Wend. 135.

7 Rex v. Mayor etc. 4 Burr. 2008; Reg. v. Corp. of Pembroke, 8 Dowl. 302.

8 People v. Albany etc. R. R. Co. 7 Abb. Pr. N. S. 265; 1 Lana. 308.

9 Faulds v. Yates, 57 Ill. 416; 8 C. 11 Am. R. 24.

10 Johnston v. Jones, 23 N. J. Eq. 216.

11 M'Neely v. Woodruff, 1 Green, 352.

12 Downing v. Potts, 3 Zab. 66; State v. Lehre, 7 Rich. 234; Wardens etc. v. Pope, 8 Gray, 140; People v. Cleotte, 16 Mich. 283; Judkins v. Hill, 50 N. H. 140; Johnston v. Charleston, 1 Bay, 441; Rex v. Jefferson, 2 Nev. & M. 487; and see Matter of Long Island R. R. Co. 19 Wend. 37; Hartt v. Harvey, 10 Abb. Pr. 321; 32 Barb. 55; State v. Swearingen, 12 Ga. 23; Mousseau v. Urquhart, 19 La. An. 482.

§ 71. Presumptions bearing on elections.—Where an officer is required to be chosen by ballot, and the record of his election does not specify the mode, the legal presumption is, that he was chosen as required.¹ If votes are cast by proxy at an election, it will be presumed that the proxies were regular and proper, in the absence of proof that they were properly executed, or that the persons executing them were members of the society.² If it be averred that the directors of a company were duly elected by the stockholders, in pursuance of notice, it will be presumed that the requisite amount of stock has been subscribed to authorize such election.³ Persons acting publicly as the officers of a corporation, are to be presumed rightfully in office.⁴ A corporation cannot object that its directors, who have acted as such, were not elected at a meeting properly notified.⁵ And the right of *de facto* directors of a corporation to act as directors cannot be questioned collaterally.⁶

1 Blanchard v. Dow, 32 Me. 557.

2 People v. Crossley, 69 Ill. 195.

3 Ashtabula etc. R. R. Co. v. Smith, 15 Ohio St. 328; and see Smith v. Erb, 4 Gill, 437.

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4 Bank of U.S. v. Dandridge, 12 Wheat. 64, 79; and see Baird v. Bank of Washington, 11 Serg. & R. 411; Trustees etc. v. Hills, 6 Cowen, 23; McCollough v. Annapolis etc. R. R. Co. 4 Gill, 58.

5 Sampson v. Bowdoinham etc. Co. 36 Me. 78; and see State v. Lehre, 7 Rich. 234; Partridge v. Badger, 25 Barb. 146; Royal British Bank v. Turquand, 6 El. & B. 248.

6 People v. Stevens, 5 Hill, 616; Rex v. Hughes, 4 Barn. & C. 308; People v. Hills, 1 Lans. 202.

CHAPTER VII.

CORPORATE LIABILITIES.

- § 72. Capacity to be sued, generally.
- § 73. May be sued by members.
- § 74. In what courts.
- § 75. In what name to be sued.
- § 76. Liability upon contracts, generally.
- § 77. Liability upon negotiable instruments.
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- § 81. Trespass to the person.
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- § 83. Libel, malicious prosecution, etc.
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- § 85. Wrongful acts resulting in death.
- § 86. Liability to indictment.
- § 87. Liability to taxation.
- § 88. Place of taxation.
- § 89. Modes of valuation and assessment.
- § 90. Exemption from liability to taxation.

§ 72. Capacity to be sued, generally.--The capacity of being sued is one of the incidents of a corporation, although it is usually contained among those powers expressly given;¹ subject to the qualification, that it is in relation to some matter within the scope of the legitimate purposes of the corporation.² Assumpsit will lie against a corporation;³ so will an action on the case;⁴ so of an action of trover;⁵ or of trespass.⁶ And certain bodies created by the legislature, having a corporate capacity for particular specified ends, have an incidental capacity to be sued, independently of any express power, and for such purpose are regarded as corporations *sub modo*.⁷ A liability imposed by statute generally, includes corporations as well as natural persons.⁸ But a corporation is

not liable to be sued for a statute penalty imposed in general terms, on any "person" who shall take logs belonging to another with intent to claim them.⁹ The fact that a state is the sole proprietor of a corporation does not prevent the corporation from being sued.¹⁰

1 See *Bradley v. Richardson*, 2 Blatchf. 343; *Inhabitants etc. v. Hodges*, 100 Mass. 241; *Whitman v. Keith*, 18 Ohio St. 134.

2 *Ancient City Club v. Miller*, 7 Lans. 412; and see *Pearce v. Railroad Co.* 21 How. 441; *Griggs v. Foote*, 4 Allen, 195; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543.

3 *Smith v. Cong. Meeting-house*, 8 Pick. 178; *Bank of Metropolis v. Gutschlieck*, 14 Peters, 19; *Randal v. Van Vechten*, 19 Johns. 60; *Lemington v. Blodgett*, 37 Vt. 215; *Herzo v. San Francisco*, 33 Cal. 134.

4 *Sargent v. Franklin Ins. Co.* 8 Pick. 90; *Shipley v. Mechanics' Bank*, 10 Johns. 484.

5 *Smith v. Birmingham etc. Gaslight Co.* 1 Ad. & E. 528.

6 *Reg. v. Birmingham etc. Railw. Co.* 3 Ad. & E. N. S. 223; *Chestnut Hill Turnp. Co. v. Rutter*, 4 Serg. & R. 16; *Maud v. Monmouthshire Canal Co.* 4 Man. & G. 452; and see *Bartee v. Houston etc. R. R. Co.* 36 Tex. 643.

7 *Todd v. Birdsall*, 1 Cowen, 260; *Levy Court v. Coroner*, 2 Wall. 501; *Clarissay v. Metrop. Fire Depart.* 7 Abb. Pr. N. S. 352.

8 See *Chase v. American Steamboat Co.* 10 R. L. 79; *Bartee v. Houston etc. R. R. Co.* 36 Tex. 643.

9 *Androscoggin Water Power Co. v. Bethel Steam Mill Co.* 64 Me. 441; and see *State v. Cincinnati Fertilizer Co.* 24 Ohio St. 611.

10 *Hutchinson v. Western etc. R. R. Co.* 6 Helsk. 634; *Moore v. Trustees of Wabash, etc.* 7 Ind. 462.

§ 73. May be sued by members.—As a general rule, a member of a corporation is not disabled by reason of his membership from maintaining an action against the corporate body, upon any cause of action he may have against it;¹ and the instances are common in which the right of a person to sue the corporation of which he is a member has been exercised.² It is no valid objection to an action against a joint-stock company, that the plaintiffs are corporators or members of the company.³ But an illusory suit in the name of a shareholder, but really prosecuted by and in the interest of a rival company, cannot be maintained for the purpose of dissolving or restraining another association or company, of which the nominal plaintiff may be a member.⁴

1 *Barnstead v. Empire Min. Co.* 5 Cal. 299; *Ex parte Booker*, 18 Ark. 238; *Waring v. Catawba Co.* 2 Bay, 109.

2 See *Culbertson v. Hubush Nav. Co.* 4 McLean, 544; *Schrich v. St. Louis etc. Co.* 34 Mo. 423; *Connell v. Woodward*, 6 Miss. 665; *Merrick v. Peru Coal Co.* 61 Ill. 472.

3 *Westcott v. Fargo*, 6 Lans. 319.

4 *Waterbury v. Merchants Un. Ex. Co.* 3 Abb. Pr. N. S. 163, 173; and see *Forrest v. Manchester etc. Co.* 7 Jur. N. S. 41; *Filder v. London etc. Railw. Co.* 1 Hem. & M. 489; *Rex v. Trevenen*, 2 Barn. & Ald. 479.

§ 74. In what courts.—For the purposes of litigation, corporations are to be considered inhabitants of the state under whose laws they exist, and the right to sue them in the courts of a different state depends generally upon express legislation.¹ But it is within the power of a state legislature to authorize a suit against a foreign corporation *in personam*, as well as a suit *in rem*.² And a corporation may be sued in the federal courts of any state other than that which created it, where service can be obtained according to the statutory rules of the state where such court is established.³ A foreign corporation, by a voluntary appearance in the courts of a state, thereby submits to their jurisdiction.⁴ And when a foreign corporation, by its officers, comes within the jurisdiction of another state, and there engages in business, it becomes subject to the laws of the latter state, and to the process of the courts;⁵ and where such a corporation, by its officers, is guilty of a wrong, or commits a trespass, within the state, it cannot escape the consequences of its illegal acts by setting up that it holds its existence under a foreign government.⁶ But if suit is commenced by service upon an officer of a foreign corporation, when he happens to be temporarily in another state, a plea to the jurisdiction will be sustained.⁷ A suit brought against a corporation created by the concurrent legislation of two states, is, in legal contemplation, a suit in which citizens of each state are joined as defendants, and if the plaintiff is a citizen of either of these states, the suit cannot be maintained in the courts of the United States.⁸ Since the enactment of the English Judicature Acts, a foreign corporation, carrying on business in England, although not incorporated

according to English law, may be sued as defendant in an English court, in respect of any cause of action which arose within the jurisdiction.⁹

1 *Lathrop v. Union Pacific Railw. Co.* 1 *McArthur*, 234; and see *Gibbs v. Queen Ins. Co.* 63 *N. Y.* 114; *Nat. Condensed Milk Co. v. Brandenburgh*, 40 *N. J. L.* 111; *Weight v. Liverpool etc. Ins. Co.* 30 *La. An.* 1186; *Flak v. Chicago etc. R. R. Co.* 53 *Barb.* 513.

2 *Barnett v. Chicago etc. R. R. Co.* 4 *Hun*, 114; 6 *Thomp. & C.* 358; and see *Bawknicht v. Liverpool etc. Ins. Co.* 55 *Ga.* 154.

3 *Ex parte Schollenberger*, 38 *U. S.* 369; *Railw. Co. v. Whitton*, 13 *Wall.* 270; and see *Eggleston v. Orange etc. R. R. Co.* 1 *Code R. N. S.* 212; *Libbey v. Hogdon*, 9 *N. H.* 394; *City etc. Ins. Co. v. Carrugi*, 41 *Ga.* 560.

4 *North Mo. R. R. Co. v. Akers*, 4 *Kans.* 453; *De Bemer v. Drew*, 57 *Barb.* 439; 39 *How. Pr.* 468; and see *Myers v. Dorr*, 13 *Blatchf.* 22; *Day v. India Rubber Co.* 1 *Id.* 628.

5 *People v. Cent. R. R. Co.* 48 *Barb.* 478; *Conn. etc. Ins. Co. v. Duereson*, 28 *Gratt.* 630.

6 *People v. Cent. R. R. Co.* 48 *Barb.* 478; *Warren Manuf. Co. v. Etna Ins. Co.* 2 *Paine*, 501; *Austin v. N. Y. etc. R. R. Co.* 1 *Dutch.* 381; and see *Richmond etc. R. R. Co. v. Richmond*, 28 *Gratt.* 83.

7 *Camden Rolling Mill Co. v. Swede Iron Co.* 32 *N. J. L.* 15; *Latimer v. Union Pacific Railw.* 43 *Mo.* 105; *Newell v. Great West. Railw. Co.* 19 *Mich.* 336.

8 *County of Alleghany v. Cleveland, etc. R. R. Co.* 51 *Pa. St.* 228. See *Sprague v. Hartford etc. R. R. Co.* 5 *R. L.* 233; *Ohio etc. R. R. Co. v. Wheeler*, 1 *Black.* 286.

9 *Newby v. Van Oppen*, *Law R.* 7 *Q. B.* 293; *Westman v. Aktiebolaget etc.* 1 *L. R. Ex. D.* 237; *Scott v. Royal Wax Candle Co.* 1 *L. R. Q. B. D.* 404.

§ 75. In what name to be sued.—As a general rule, a corporation can be sued only by its corporate name.¹ The name of a corporation is of its very essence, and a change of name in the execution, from that by which it is sued and judgment entered up against it, is a material variance.² But after the name of a corporation has been lawfully changed, it should be sued by its new name.³ And appearing and answering to the merits admits that the defendant is correctly named.⁴ In general, a corporation may be declared against by what purports to be a corporation name, without setting forth by averment how it acquired that name.⁵ If the description impliedly amounts to an allegation that the defendants are a corporate body, it is sufficient.⁶ A corporation defendant can take advantage of a misnomer only by pleading it in abatement.⁷

1 *Curtiss v. Murry*, 26 Cal. 633; *Bradley v. Richardson*, 2 Blatchf. 243; *Hay v. McCoy*, 6 Id. 69; *Lucas v. Johnson*, 8 Barb. 244; *Herod v. Rodman*, 16 Ind. 241; *Campbell v. Brunt*, 25 Ill. 225.

2 *Bradford v. Water Lot Co.* 58 Ga. 280.

3 *Mayor of Colchester v. Seaber*, 3 Burr. 1366; *Gould v. Sub-District No. 3*, 7 Minn. 203. Compare *Morris v. St. Paul etc. Railw. Co.* 19 Id. 628; *Eaton etc. R. R. Co. v. Hunt*, 20 Ind. 457; *Thrasher v. Pike etc. R. Co.* 25 Ill. 393; *Dean v. La Motte Lead Co.* 50 Mo. 223.

4 *Virginia etc. Steam Nav. Co. v. United States*, Taney, 418; *Lake Superior Bulld. Co. v. Thompson*, 32 Mich. 293; *School District v. Griner*, 8 Kan. 224.

5 *Hart v. Balt. etc. R. R. Co.* 6 W. Va. 336; *Dodge v. Minnesota etc. Roofing Co.* 14 Minn. 49; and see *La Fayette Ins. Co. v. Rogers*, 30 Barb. 491; *Williams v. Franklin Township etc.* 28 Ind. 310.

6 *Woolf v. City Steamboat Co.* 6 Dowl. & L. 606; 7 Com. B. 103; and see *Towne v. London etc. Ship Co.* 5 Com. B. N. S. 730; *Ingate v. Australian Lloyd's Co.* 4 Id. 704.

7 *Gilbert v. Nantucket Bank*, 5 Mass. 97; and see *Stone v. Berkshire Cong. Soc.* 14 Vt. 86; *Thatcher v. West River Nat. Bank*, 19 Mich. 196.

§ 76. Liability upon contracts generally.—Corporations are in general bound by all contracts, whether express or implied, whether by bond, bill of exchange, or negotiable note, entered into in the usual and necessary course of their legitimate business, except when there is a statutory prohibition.¹ And a contract entered into by an officer or agent of a corporation, without authority from the corporation to make it, may be rendered obligatory upon the corporation by a subsequent ratification.² And a ratification may be inferred from corporate acts involving or implying a confirmation;³ or from the acquiescence of the directors or other governing body of the corporation;⁴ or a ratification may be presumed from lapse of time.⁵ If a corporation accepts the benefit of a contract negotiated for them, this will operate as a ratification of the entire contract.⁶ So, bringing suit by the corporation upon the unauthorized contract is a ratification thereof;⁷ and resistance by a corporation of an attempt to recover property which it acquired by the instrumentality of one acting as its agent, was deemed a sufficient recognition of the agency.⁸ But a corporation cannot ratify an act of an agent which it could not in the first instance have directly empowered him to perform.⁹

And those who ratify must be those who might have given the original authority.¹⁰ A board acting collectively can ratify a contract made in their behalf without original authority, if it is one within their general powers to make, but individual members of the board cannot ratify it.¹¹ So, in order to sustain a contract against a corporation upon the ground of a corporate ratification, it must be shown that the acts, etc., relied upon as constituting a ratification, were performed with a full knowledge of all the material facts;¹² and the ratification must be complete.¹³ A corporation cannot disaffirm a contract made by an agent as to those parts which impose an obligation, and affirm it so far as it operates to advantage.¹⁴ So, if the adoption of any particular form or mode is necessary to confer the authority to contract in the first instance, there can be no valid ratification except in the same manner.¹⁵ Thus, if a sealed power, or a written vote of the corporation is necessary to give authority, the ratification must likewise be under seal, or by written vote.¹⁶ If the contract be within the scope of the corporate franchise, and merely fails to conform to the regulations prescribed by the charter for the guidance of the corporate officers and the protection of the rights of members as to each other, the corporation may be held liable, under the general rules of law as to agents, estoppel, waiver, etc.¹⁷ Thus, a corporation which permits appearances to exist, and its officers and agents to so act, as to give one employed by them reason to believe that he is employed by the company, will be liable to such person as his employer to pay for the services rendered.¹⁸ But in the absence of proof of acceptance thereof by the corporation, services rendered and expenses incurred therefor prior to its organization will be presumed to have been gratuitous, in view of the general good or private benefit expected to result from the object of the corporation.¹⁹ And a corporation is not barred from resisting alleged liability either by a ratification or estop-

pel, unless the party claiming the bar is a *bona fide* third person, or the contract in question is expressly or by necessary implication forbidden by its charter.²⁰

1 *McMasters v. Reed*, 1 Grant Cas. 36; and see *Legrand v. Mercantile Assoc.* 80 N. Y. 638; *Sturtevant v. City of Alton*, 3 McLean, 393; *Strauss v. Eagle Ins. Co.* 5 Ohio St. 59; *Hurd v. Green*, 17 Hun, 327; *Taylor v. Chichester etc. Railw. Co.* Law R. 2 Ex. 356; *Riche v. Ashbury Railw. etc. Co.* Law R. 9 Ex. 244; *Redmond v. South Wales Railw. Co.* 10 Com. B. N. S. 675. See *infra*, ULTRA VIRES.

2 *Church v. Sterling*, 16 Conn. 388; *Salem Bank v. Gloucester Bank*, 17 Mass. 128; *Baker v. Cotter*, 47 Me. 236; *Whitwell v. Warner*, 20 Vt. 425; *Einmet v. Reed*, 8 N. Y. 312; *Aurora Agric. etc. Soc.* 80 Ill. 283; *Kelsey v. National Bank*, 69 Pa. St. 428; *Alexander v. Swift*, 31 Cal. 28; *Atlantic etc. Ins. Co. v. Sanders*, 36 N. H. 252; *Perry v. Simpson etc. Manuf. Co.* 37 Conn. 520; *Inhabitants etc. v. Pierce*, 122 Mass. 270; *Reuter v. Electric Tel. Co.* 6 El. & B. 341; *Bargate v. Shortridge*, 5 H. L. Cas. 297; 31 Eng. L. & Eq. 44; *Re New Zealand Bank Co.* Law R. 3 Ch. 131; *Armstrong v. Stokes*, Law R. 7 Q. B. 598.

3 *Ridgway v. Farmers' Bank*, 12 Serg. & R. 256; *Howe v. Keeler*, 37 Conn. 533; *St. George's Harbor Co.* 2 De Gex & J. 547; *Rich v. State Bank*, 7 Neb. 201; *Fleckner v. U. S. Bank*, 8 Wheat. 333, 363. Compare *Southard v. Inhabitants of Bradford*, 53 Me. 389.

4 *Walworth County Bank v. Farmers' Loan etc. Co.* 16 Wis. 629; *Woodbridge v. Proprietors etc.* 19 N. Y. 207; *Alabama etc. R. R. Co. v. Kidel*, 29 Ala. 221; *Payson v. Stoevers*, 2 Dill. 427; *Phosphate of Lime Co. v. Green*, Law R. 7 Com. P. 43; and see *Speckman v. Evans*, Law R. 3 H. L. 171; *Williams v. Evans*, Law R. 19 Eq. 547.

5 *Union Bank of Florida v. Call*, 5 Fla. 409. But lapse of time, merely, would not make valid that which was originally invalid—Law R. 3 H. L. 775; and see *Ormsby v. Copper Min. Co.* 56 N. Y. 623.

6 *Shaver v. Bear River etc. Min. Co.* 10 Cal. 396; *Houghton v. Dodge*, 5 Bosw. 328; *Episcopal etc. Soc. v. Episcopal Church*, 1 Pick. 372; *Witt v. Mayor etc.* 5 Robt. 249; *Brown v. Winnisimmet Co.* 11 Allen, 326; *Hilliard v. Gould*, 34 N. H. 330; and see *Gooday v. Colchester etc. Railw. Co.* 17 Beav. 132.

7 See *Roe v. Pierce*, 2 Camp. 96; *Planters' Bank v. Sharp*, 4 Smedes & M. 75; *Fishmongers' Co. v. Robertson*, 5 Man. & G. 131. Compare *Mayor of Kidderminster v. Hardwick*, Law R. 9 Ex. 13; *Copper Miners' Co. v. Fox*, 16 Q. B. 229.

8 *Lathrop v. Commercial Bank*, 8 Dana, 114.

9 *Martin v. Zellerbach*, 33 Cal. 300; *Barton v. Plank Road Co.* 17 Barb. 397; *Taymouth v. Koehler*, 35 Mich. 22; *Estey v. Inhabitants of Westminster*, 67 Mass. 324; *Downing v. Mt. Washington Road Co.* 40 N. H. 230; *Dubuque Female College v. City of Dubuque*, 13 Iowa, 535; *Peterson v. Mayor etc.* 17 N. Y. 449; and see *McCracken v. San Francisco*, 16 Cal. 591; *Cook v. Tullis*, 18 Wall. 332.

10 *Taymouth v. Koehler*, 35 Mich. 22.

11 *Taymouth v. Koehler*, 35 Mich. 22; *Tracy v. Guthrie etc. Soc.* 47 Iowa, 27.

12 *Penn'a etc. Nav. Co. v. Danbridge*, 8 Gill & J. 248; *Cumberland Coal etc. Co. v. Sherman*, 20 Md. 117; *State Bank v. U. S. Pottery Co.* 24 Vt. 144; *Greer v. Mayor etc.* 4 Robt. 675; *Blen v. Bear River etc. Min. Co.* 20 Cal. 602; *Downes v. Ship*, Law R. 3 H. L. 343; *Stewart's Case*, Law R. 1 Ch. 511; and see *Kent v. Quicksilver Min. Co.* 12 Hun, 53; *Hoyt v. The Same*, 17 Id. 169.

13 *Whitwell v. Warner*, 20 Vt. 425.

14 Davenport etc. Assoc. v. North American Ins. Co. 16 Iowa, 74; Peninsula Bank v. Hanmer, 14 Mich. 203.

15 Dispatch Line etc. v. Bellamy Manuf. Co. 12 N. H. 205.

16 See Dispatch Line etc. v. Bellamy Manuf. Co. 12 N. H. 205; McLaughlin v. Detroit etc. R. R. Co. 8 Mich. 100; Peterson v. Mayor etc. 17 N. Y. 449; Fleckner v. U. S. Bank, 8 Wheat. 338.

17 City Fire Ins. Co. v. Carrugi, 41 Ga. 660; and see Goodwin v. Union Screw Co. 34 N. H. 380; Grape Sugar etc. Co. v. Small, 40 Md. 395; Erie Railw. Co. v. Del. etc. Railw. Co. 21 N. J. Eq. 283.

18 Gowan Marble Co. v. Tarrant, 73 Ill. 608.

19 Rockford etc. R. R. Co. v. Sage, 65 Ill. 328; Western Screw etc. Co. v. Cousley, 72 Id. 531; New York etc. R. R. Co. v. Ketchum, 27 Conn. 170. Compare Low v. Conn. etc. R. R. Co. 45 N. H. 370; 46 Id. 234; Bell's Gap R. R. Co. v. Christy, 79 Pa. St. 54; Marchand v. Loan etc. Assoc. 28 La. An. 389; Charter v. San Francisco Sugar Refinery Co. 19 Cal. 220.

20 Downing v. Mt. Washington Road Co. 40 N. H. 230; Riche v. Ashbury Railw. etc. Co. Law R. 7 H. L. 653. See *infra*, ULTRA VIRES.

§ 77. Liability upon negotiable instruments.—

The right of a corporation to issue negotiable paper for any of its lawful purposes, is incident to its expressed powers or objects,¹ and it may be held liable, not only upon negotiable instruments which it has expressly authorized,² but also upon those issued by its treasurer in accordance with a usage.³ And corporations having power to issue negotiable instruments are liable on them, when in the hands of *bona fide* holders, although they were issued for improper purposes.⁴ A promissory note made by a township trustee, which shows upon its face that it was given for a consideration received by the school township, may be enforced against that corporation, notwithstanding it is signed as the note of the civil township;⁵ but such note is not entitled to the privileges of commercial paper, and an assignee takes it subject to defenses.⁶ In England, corporate bodies may issue negotiable instruments where the nature and character of their business warrants it;⁷ but the mere fact that a corporation trades, or otherwise engages in business, is not sufficient to enable it to issue such instruments.⁸ Thus, such power has been denied to railway companies,⁹ and to various other companies;¹⁰ but was allowed to a colliery company.¹¹ In this country the right to make promissory notes belongs to railway,¹² mining,¹³ insur-

ance,¹⁴ manufacturing,¹⁵ and other like companies.¹⁶ But the general powers of a manufacturing or other like company do not extend to indorsing negotiable paper for accommodation.¹⁷ A corporation cannot, however, defend an action on negotiable paper indorsed with its name by its agent, for the accommodation of a third person, on the ground that the agent had no authority so to indorse it, where the proof shows that the agent had frequently before indorsed its business paper, and procured it to be discounted by the plaintiff, which indorsements the corporation had recognized.¹⁸ And a corporation with power to make notes for any purpose, cannot defend its liability on a note to a *bona fide* holder for value and without notice, on the ground that the particular note was made for accommodation, and that it had no authority to make accommodation notes.¹⁹ A corporation, properly charged as indorser of a promissory note, is bound to pay the amount legally due thereon, although the agent of the corporation agreed to pay an illegal rate of interest to procure delay in payment.²⁰ The declaration on a promissory note, made by a corporation, need not aver that the maker acted within the scope of its corporate powers;²¹ this is presumed.²² The power to issue bonds is germane to the objects of business or trading corporations, and it is for this they hold a common seal.²³ And in aid of the validity of a corporate bond, it will be presumed that a seal attached is the corporate seal, and not the private seal of the agent.²⁴ In general, such bonds as are ordinarily issued by corporations, drawn payable to bearer, and intended for sale in the public market, are to be regarded and treated as negotiable instruments.²⁵ They are also regarded as chattels, in so far as to relieve them from defenses and burdens incident to choses in action merely, and to give them a merchantable and vendible quality.²⁶ The obligations of a corporation upon its bonds are, in general, the same as those of a natural person.²⁷ Coupons or interest warrants, though

originally issued as appendant to bonds, are transmutable into independent contracts for the payment of the interest they represent, by detaching and delivering pursuant to the intent of the obligors.²⁸ After they are detached from the bonds, they are in law treated and regarded as bank-bills, currency, or the original bonds.²⁹ And the possession of the coupons is presumptive evidence of a right to receive the interest covered by them.³⁰ Although the bonds of a corporation are made payable at its office, and in a particular manner, yet, if at the maturity of the bonds the company has no office at the place designated, a demand of payment elsewhere is sufficient.³¹ And the fact that a coupon attached to a negotiable bond, is, by its terms, payable at a particular place, does not render presentation for payment at that place a condition precedent to an action thereon.³² The holder of bonds issued by a corporation, payable to bearer, may maintain an action on them in his own name.³³

1 *Smith v. Eureka Flour Mills*, 6 Cal. 1; *Carnie v. Brigham*, 39 Me. 35; *Mead v. Keeler*, 21 Barb. 20; *Matter of Hercules etc. Assur. Co.* 6 Ben. 35; *Sinead v. Indianapolis etc. R. R. Co.* 11 Ind. 104.

2 See *Butts v. Cuthbertson*, 6 Ga. 166; *Lawrence v. Gebhard*, 41 Barb. 575.

3 *Re Great Western Telegraph Co.* 5 Blas. 363. Compare *Bradley v. Ballard*, 55 Ill. 413; *Ehrgatt v. Bridge Manuf. Co.* 16 Kan. 486.

4 *Monument Nat. Bank v. Globe Works*, 101 Mass. 57; and see *Meyer v. Muscatine*, 1 Wall. 384, 393; *Phila. etc. R. R. Co. v. Lewis*, 33 Pa. St. 33; *Balfour v. Ernest*, 5 Com. B. N. S. 601.

5 *Sheffield School Township v. Andress*, 56 Ind. 157; see *Whitney v. Inhabitants of Stow*, 111 Mass. 363; *Blanchard v. Knoll*, 44 Cal. 440.

6 *Monument Nat. Bank v. Globe Works*, 101 Mass. 57.

7 *Re General Estate Co.* Law R. 3 Ch. 758; and see *Peruvian Railway Co. v. Thames etc. Ins. Co.* Law R. 2 Ch. 617; *Re Land Credit Co.* Law R. 4 Ch. 460.

8 *Bateman v. Mid-Wales Railw. Co.* Law R. 1 Com. P. 499.

9 *Bateman v. Mid-Wales Railw. Co.* Law R. 1 Com. P. 499.

10 *Neale v. Turton*, 4 Bing. 149; *Dickinson v. Valpy*, 10 Barn. & C. 128; *Steele v. Harmer*, 14 Mees & W. 831; *Bult v. Morell*, 13 Ad. & E. 745; *Mill v. Hawker*, Law R. 9 Ex. 322; *Thompson v. Universal Salvage Co.* 1 Ex. 694.

11 *Barrett's Case*, 4 De Gex J. & S. 758.

12 *Lucas v. Pitney*, 27 N. J. L. 221; *Hamilton v. New Castle etc. R. R. Co.* 9 Ind. 259; *Olcott v. Tioga R. R. Co.* 27 N. Y. 546.

13 *Moss v. Averell*, 10 N. Y. 449, 457; and see *Wood etc. Mining Co.* 45 Ga. 34; but the general superintendent of a mining company has not

implied power to bind the company by promissory notes—*Carpenter v. Briggs*, 46 Cal. 91; *Union Gold Min. Co. v. Rocky Mt. Nat. Bank*, 2 Colo. 553; nor has the secretary such power—*Blood v. Marcuse*, 38 Cal. 590.

14 *Barker v. Mech. Fire Ins. Co.* 3 Wend. 94; and see *Hascall v. Life Assoc. of America*, 5 Hun, 151; but see *Bacon v. Miss. Ins. Co.* 31 Miss. 116.

15 *Clark v. Farmers' etc. Manuf. Co.* 15 Wend. 256; *Oxford Iron Co. v. Spradley*, 46 Ala. 98; *Commercial Bank v. Newport Manuf. Co.* 1 Mon. D. 13.

16 *Oxford Iron Co. v. Spradley*, 46 Ala. 98; *Clark v. School District*, 3 R. I. 159.

17 *Lafayette Savings Bank v. St. Louis Stoneware Co.* 2 Mo. App. 299; *Bridgeport City Bank v. Empire Stone Dressing Co.* 19 How. Pr. 51; 30 Barb. 421; *Morford v. Farmers' Bank etc.* 24 Barb. 568.

18 *Bank of Auburn v. Putnam*, 1 Abb. Ct. App. 80; 3 Keyes, 343; and see *Marine Bank v. Clements*, 6 Bosw. 168.

19 *Monument Nat. Bank v. Globe Works*, 101 Mass. 57; *Bank of Genesee v. Patchin Bank*, 19 N. Y. 312.

20 *Whitney v. South Paris Manuf. Co.* 39 Me. 316.

21 *Montague v. Church School District*, 34 N. J. L. 218.

22 See *Dana v. Bank of St. Paul*, 4 Minn. 385; *Chautaque County Bank v. Risley*, 19 N. Y. 369; *Bates v. State Bank*, 2 Ala. 451.

23 *Williamsport v. Commonw.* 84 Pa. St. 487; *Commonw. v. Council of Pittsburg*, 41 Id. 278; *Vicksburg v. Lombard*, 51 Miss. 111; *Comm'rs etc. v. Atlantic R. Co.* 77 No. Car. 289; *Tucker v. Raleigh*, 75 Id. 267.

24 *Miller v. Superior Machine Co.* 79 Ill. 450.

25 *Mercer County v. Hackett*, 1 Wall. 83, 85; *Pendleton Co. v. Amy*, 13 Id. 297; *Haven v. Grand Junction R. R. Co.* 109 Mass. 83; *Morris Canal Co. v. Lewis*, 12 N. J. Eq. 323; *Carr v. Lefevre*, 27 Pa. St. 418; *Bunting v. Camden etc. R. R. Co.* 81 Id. 254; *Virginia v. Maryland*, 52 Md. 547; *Blake v. Livingston Co.* 61 Barb. 141; *New Albany Plank Road Co. v. Smith*, 23 Ind. 353; *Soc. for Savings v. New London*, 29 Conn. 174. See *infra*, MUNICIPAL CORPORATIONS.

26 *Griffith v. Burden*, 35 Iowa, 138; and see *Memphis v. Brown*, 11 Am. Law Reg. 619; 6 West. Jur. 436.

27 *Brand v. Donaldsonville*, 28 La. An. 558; see *Hill v. Manchester etc. Water Works Co.* 2 Barn. & Ald. 544; 5 Barn. & Ald. 866; 2 Nev. & M. 573; *Phila. etc. R. R. Co. v. Lewis*, 33 Pa. St. 33.

28 *Thompson v. Lee County*, 3 Wall. 327; *Cromwell v. County of Sac.* 94 U. S. 351, 362; *San Antonio v. Lane*, 33 Tex. 405; *Spooner v. Holmes*, 102 Mass. 503; *Underhill v. Trustees*, 17 Cal. 172; *Morris Canal Co. v. Fisher*, 1 Stockt. Ch. 667.

29 *Evertson v. Nat. Bank*, 66 N. Y. 14; *Murray v. Larimer*, 2 Wall. 110; *Commonw. v. Emigrant etc. Bank*, 98 Mass. 12; see *Clarke v. Jaucaville*, 1 Biss. 98.

30 *McCoy v. Washington County*, 3 Wall. Jr. 381; *Burroughs v. Richmond County*, 65 No. Car. 234; *Nat. Exchange Bank v. Hartford etc. R. R. Co.* 8 R. I. 375; *Cicero v. Clifford*, 53 Ind. 191.

31 *Alexander v. Atlantic etc. R. R. Co.* 67 No. Car. 108.

32 *Smith v. Tallapoosa County*, 2 Woods, 574; and see *Shaw v. Bill*, 98 U. S. 10.

33 *Carr v. Lefevre*, 27 Pa. St. 413; *Johnson v. County of Stark*, 24 Ill. 75; and see *Vertue v. East Anglian Railw. Co.* 5 Ex. 280; *Soc. for Savings v. New London*, 29 Conn. 174.

BOONE CORP.—9.

§ 78. **Liability for wrongs.**—Corporations are capable of committing most varieties of torts, and are liable in actions of tort in the same way, and to the same extent, as natural persons.¹ They are liable for every grade and description of forcible, malicious, or negligent tort or wrong which they commit, however foreign to their nature or beyond their granted powers the wrongful transaction or act may be.² In such cases the doctrine of *ultra vires* has no application.³ And as it respects liability for torts under ordinary circumstances, it is immaterial whether the corporation is a business corporation aggregate,⁴ or one which exists merely for public purposes;⁵ each is equally under obligations so to conduct its affairs as not to cause injury to others, and failing in this, it is liable for the resulting damage.⁶ But a distinction exists between aggregate corporations, properly so called, and involuntary *quasi* corporations;⁷ the latter are liable to information or indictment for a neglect of a public duty imposed on them by law, but no private action can be maintained against them for a breach of their corporate duty, unless such action be given by statute.⁸

1 Bissell v. Southern etc. R. R. Co. 23 N. Y. 258; Smith v. Rathbun, 66 Barb. 403; Titus v. President etc. of Turnp. Road, 61 N. Y. 237; Johnson v. St. Louis Despatch Co. 2 Mo. App. 563; Hays v. Houston etc. R. R. Co. 46 Tex. 372; Vinas v. Merchants' etc. Ins. Co. 27 La. An. 367; Yarborough v. Bank of England, 16 East, 6; Green v. London Omnibus Co. 7 Com. B. N. S. 290.

2 New York etc. R. R. Co. v. Schnyler, 34 N. Y. 30; and see Western Union Tel. Co. v. Eyser, 2 Cal. 141; Peebles v. Patapasco Guano Co. 77 No. Car. 233; Pittsburgh etc. R. R. Co. v. Slusser, 19 Ohio St. 157.

3 Merchants' Bank v. State Bank, 10 Wall. 604, 645; Booth v. Farmers' etc. Bank, 50 N. Y. 398, 400; Hewett v. Swift, 3 Allen, 420; Goodspeed v. East Haddam Bank, 22 Conn. 530; Nat. Bank v. Graham, 100 U. S. 698.

4 See Hooker v. New Haven etc. Co. 15 Conn. 312, 321; Life Ins. Co. v. Fire Ins. Co. 7 Wend. 31.

5 Dayton v. Pease, 4 Ohio St. 60; Thayer v. Boston, 19 Pick. 511; Brower v. New York, 3 Barb. 254; Brownlow v. Metrop. Board, 16 Conn. B. N. S. 546; Ruck v. Williams, 3 Hurl. & N. 308.

6 Southampton etc. Bridge Co. v. Southampton Local Board, 8 EL. & B. 801; Brokaw v. New Jersey etc. Turnp. Co. 32 N. J. L. 328.

7 See Hamilton County v. Mighels, 7 Ohio St. 109; Touchard v. Touchard, 5 Cal. 306; Gas Co. v. San Francisco, 9 Id. 453; Wilson v. School District, 32 N. H. 118.

8 Riddle v. Merrimack River Locks, 7 Mass. 169; Mower v. Inhabitants of Leicester, 9 id. 247; Bray v. Wallingford, 20 Conn. 416; Freeholders v. Strader, 3 Har. 108; Symonds v. Supervisors etc. 71 Ill. 355; Seales v. Ordinary etc. 41 Ga. 225; Jacobs v. Hamilton County, 1 Bond, 500; 4 Fish. Pat. Cas. 81; Wehn v. Comm'rs etc. 5 Neb. 494; Hannon v. County of St. Louis, 62 Mo. 313; Van Eppes v. Comm'rs etc. 25 Ala. 460; Barbour County v. Horn, 43 id. 649; Brabham v. Supervisors etc. 54 Miss. 363; 28 Am. R. 51; Russell v. Men of Devon, 2 Term Rep. 661; Mackinnon v. Penson, 25 Eng. L. & Eq. 457; but compare House v. Comm'rs etc. 60 Ind. 580; 28 Am. Rep. 657.

§ 79. In cases of fraud.—Strictly speaking, a corporation cannot itself be guilty of fraud;¹ but where the circumstances are such that the fraud can be imputed to the corporation, it will be held liable therefor.² Thus, where reports are made to the shareholders of a company by the directors, and are duly adopted by the shareholders, and such reports are afterward circulated, misrepresentations contained in them must be taken to be representations and statements made with the authority of the company, and binding upon it.³ So, if the agents employed by a corporation conduct themselves fraudulently, so that if they had been acting for private employers such employers would have been affected by their fraud, the same principles must prevail where the principal under whom the agent acts is a corporation.⁴ A corporation can no more repudiate the fraudulent conduct of its agents than an individual can.⁵ As the directors and managing officers exercise all the powers of the corporation, they must, in respect to all external relations, be considered as identical with the corporation itself.⁶ For the false and fraudulent representations by an agent of a corporation in dealing in its behalf, the corporation may be held liable in damages;⁷ and the fraud of an authorized agent of a corporation will invalidate a contract procured thereby,⁸ although, in perpetrating the fraud, the agent acted without the knowledge or consent of his principal.⁹ Nor will a corporation be permitted to retain any benefit it may have obtained through the fraudulent representations of its agents.¹⁰ But the liability of corporations for the frauds and misrepresentations of their agents is

limited to cases in which the latter are acting within the scope of their authority.¹¹

1 See *Ranger v. Great West. Railw. Co.* 5 H. L. Cas. 72; *Sharp v. Mayor etc.* 40 Barb. 253, 273.

2 *New Brunswick etc. Railw. Co. v. Conybeare*, 9 H. L. Cas. 725; *Denton v. Great North. Railw. Co.* 5 El. & B. 850; *Re Nat. Patent Steam etc. Co.* 4 Drew. 823; *Nat. Exchange Co. v. Drew*, 2 Macq. 103.

3 *New Brunswick etc. Railw. Co. v. Conybeare*, 9 H. L. Cas. 725; see *Nichols' Case*, 3 De Gex & J. 427.

4 *Ranger v. Great West. Railw. Co.* 5 H. L. Cas. 72; *Brokaw v. New Jersey etc. Turnp. Co.* 32 N. J. L. 331; *Sandford v. Handy*, 23 Wend. 203; *Fogg v. Griffin*, 2 Allen, 1; *City of Covington v. Covington etc. Bridge Co.* 10 Bush, 63; *Scofield etc. Co. v. State*, 54 Ga. 635.

5 *Rives v. Montgomery Plank Road Co.* 30 Ala. 92; *Litchfield Bank v. Peck*, 29 Conn. 384.

6 *Lee v. Village of Sandy Hill*, 40 N. Y. 442, 451; *Perkins v. New York Cent. R. R. Co.* 24 Id. 213.

7 *Peebles v. Patapsco Guano Co.* 77 No. Car. 233; *Barwick v. English Joint Stock Bank*, Law R. 2 Ex. 239; *Mackay v. Commercial Bank*, Law R. 5 P. C. 334; *Swift v. Winterbotham*, Law R. 8 Q. B. 244; *Kennedy v. Panama etc. Mail Co.* Law R. 2 Id. 530.

8 *Derrick v. Lamar Ins. Co.* 74 Ill. 404; *McClellan v. Scott*, 9 Wis. 81.

9 *Henderson v. Railroad Co.* 17 Tex. 560. Compare *Fort Wayne etc. Turnp. Co. v. Deam*, 10 Ind. 503.

10 *Henderson v. Lacon*, Law R. 5 Eq. 249; *Johnston v. S. W. etc. Bank*, 3 Strob. Ex. 203; *West. Bank of Scotland v. Addle*, Law R. 1 Shaw & D. 145; *Oakes v. Turquand*, Law R. 2 H. L. Cas. 325; *Union Pacif. R. R. Co. v. Durant*, 3 Dill. 343; and see *Crump v. U. S. Min. Co.* 7 Gratt. 352.

11 *Allen v. London etc. Railw. Co.* Law R. 6 Q. B. 65; *Swift v. Jewsbury*, 9 Id. 361, 503; 8 Eug. R. 351; *Ross v. Estates Investment Co.* Law R. 3 Ch. 682; *Chicago etc. Railw. Co. v. James*, 23 Wis. 194; *Silliman v. Fredericksburgh etc. R. R. Co.* 27 Gratt. 120.

§ 80. Tortious acts of agents.—In general, a corporation is liable in a civil action, the same as a natural person,¹ for the tortious acts of its servants or agents within the general scope of their employment,² committed by the authority of the corporation, express or implied,³ whether such acts fall within the designation of forcible, negligent, malicious, or fraudulent torts.⁴ If the agent was acting within the general scope of his employment, and in the usual manner of carrying out his duties, the corporation is liable, although the particular acts of the agent were not previously authorized or subsequently ratified by the corporation;⁵ or, if authorized, although the act of the agent was performed in a manner

contrary to instructions.⁶ And a corporation cannot relieve itself from liability for a wrong by showing that the injury complained of arose from a mistake of one of its own agents;⁷ as, where a railway company is sued for damages for violence used by a conductor toward a passenger, it is not a defense that the passenger was without a proper ticket, and the acts complained of were done to compel him to pay fare, if the want of a ticket was due to the mistake of the ticket agent.⁸ A corporation may be subjected to exemplary or punitive damages for such tortious acts of its servants or agents, done within the scope of their employment, as would, if done by an individual acting for himself, render him liable for such damages.⁹ And knowingly to employ incompetent, drunken, or reckless servants, may render a corporation liable for exemplary damages.¹⁰ As it respects liability for damages inflicted by an agent, no distinction is made as to whether the principal be a natural or an artificial person.¹¹ But where punitive damages are allowable against a corporation, the condition and circumstances of the defendant are material considerations.¹²

1 *Reg. v. Birmingham etc. Railw. Co.* 9 Car. & P. 469; *Bargate v. Shortridge*, 5 H. L. Cas. 297; *Nat. Exchange Co. v. Drew*, 32 Eng. L. & Eq. 1; *Hewett v. Swift*, 3 Allen, 420; *McDougald v. Bellamy*, 18 Ga. 411; *State v. Vt. Cent. R. R. Co.* 27 Vt. 103; *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30, 50.

2 *Yarborough v. Bank of England*, 16 East, 6; *Jenkins v. Morris*, 16 Mees. & W. 880; *Magill v. Kaufman*, 4 Serg. & R. 317; *Lowell v. Boston etc. R. R. Co.* 23 Pick. 24; *Sawyer v. Winnegance Mill Co.* 26 Me. 127; *Sav. Inst. v. Nat. Bank*, 80 N. Y. 162.

3 *Edwards v. London etc. Railw. Co.* Law R. 5 Com. P. 445; *Allens. London etc. Railw. Co.* Law R. 6 Q. B. 65; *Goff v. Great North. Railw. Co.* 3 El. & E. 672; *Hay v. Cohoes Co.* 3 Barb. 42; *Underwood v. Newport Lyceum*, 5 B. Mon. 129.

4 *Chicago etc. R. R. Co. v. Williams*, 55 Ill. 185; *Penn'a R. R. Co. v. Vandiver*, 42 Pa. St. 365; *Kline v. Cent. Pacif. R. R. Co.* 39 Cal. 537; *Brokaw v. New Jersey etc. Co.* 32 N. J. L. 323; *Hamilton v. Third Av. R. R. Co.* 53 N. Y. 25; *Railroad Co. v. Hanning*, 15 Wall. 649; *Johnson v. St. Louis Dispatch Co.* 2 Mo. App. 565; *Vinas v. Merchants' etc. Ins. Co.* 27 La. An. 368; *Scofield etc. Co. v. State*, 54 Ga. 635; and see *Cumberland etc. Canal Co. v. Portland*, 56 Me. 77.

5 *Indianapolis etc. Railw. Co. v. Anthony*, 43 Ind. 183; and see *Turner v. North Beach etc. R. R. Co.* 34 Cal. 534; *Hays v. Houston etc. R. R. Co.* 46 Tex. 272.

6 *Rounds v. Del. etc. R. R. Co.* 64 N. Y. 129; *Phila. etc. R. R. Co. v. Derby*, 14 How. 468; *Oliver v. North Pacif. Transp. Co.* 3 Oreg. 84; *Bay-*

ley v. Manchester etc. Railw. Co. Law R. 8 Com. P. 148; Betts v. De Vitre, Law R. 3 Ch. 429; Reg. v. Stephens, 1 Q. B. 702.

7 See Quigley v. Cent. etc. R. R. Co. 11 Nev. 350; Perkins v. Mo. etc. R. R. Co. 53 Mo. 201; Du Lanran v. St. Paul etc. R. R. Co. 15 Minn. 49; McKinley v. Chicago etc. Railway Co. 44 Iowa, 314; Bayley v. Manchester etc. Railw. Co. Law R. 7 Com. P. 415.

8 Balt. etc. R. R. Co. v. Blocher, 27 Md. 277.

9 Pittsburgh etc. R. R. Co. v. Slusser, 19 Ohio St. 157; Atlantic etc. R. R. Co. v. Dunn, id. 162; 2 Am. R. 382; Goddard v. Grand Trunk R. R. Co. 57 Mo. 202; Henson v. Railroad Co. 62 Id. 84; Singer Manuf. Co. v. Holdfort, 86 Ill. 455; 29 Am. R. 43; Phila. etc. R. R. Co. v. Larkin, 47 Md. 153; 23 Am. R. 442; Beale v. Railw. Co. 1 Dill. 568. Compare Mendelsohn v. Anahelm Lighter Co. 40 Cal. 657; Milwaukee etc. R. R. Co. v. Arms, 51 U. S. 489; Fay v. Parker, 53 N. H. 342; McKinley v. Chicago etc. Railw. Co. 44 Iowa, 314.

10 Ill. Cent. R. R. Co. v. Hanlmer, 73 Ill. 347; and see New Orleans etc. R. R. Co. v. Statham, 42 Miss. 607; Rogers v. Ferguson, 36 Tex. 544.

11 West. Un. Tel. Co. v. Eysler, 5 Colo. 141; Hays v. Houston etc. R. R. Co. 46 Tex. 272.

12 Belknap v. Boston etc. R. R. Co. 49 N. H. 358; see Fay v. Parker, 53 N. H. 342.

§ 81. Trespass to the person.—An action for trespass to the person will lie against a corporation as against an individual;¹ thus, if the servant or agent of a railway corporation, while acting for it, and within the scope of his supposed duty, should, although without the authority of the corporation, unlawfully assault and beat a passenger, the corporation will be held responsible therefor in damages.² The corporation is liable, if its servants, through misjudgment or violence of temper, use more force than is necessary to execute the orders of the corporation;³ but if the servant or agent should, for the time being, leave his employment, and willfully commit an assault and battery upon another, the corporation is not liable therefor.⁴

1 Coleman v. New York etc. R. R. Co. 105 Mass. 160; Kline v. Cent. Pacif. R. R. Co. 39 Cal. 557; Jeffersonville R. R. Co. v. Rogers, 38 Ind. 116; Eastern Counties Railw. Co. v. Broom, 6 Ex. 314; 6 Eng. Railw. Cas. 743; Limpus v. London Omnibus Co. 1 Hurl. & C. 526; Seymour v. Greenwood, 7 Hurl. & N. 355. *Contra*, Orr v. Bank of U. S. 1 Ohio, 36; Childs v. Bank of Mo. 17 Mo. 213.

2 Phila. etc. Railw. Co. v. Derby, 14 How. 468; Crocker v. New London etc. Railw. Co. 24 Conn. 249; Higgins v. Watervliet R. R. Co. 46 N. Y. 23; Passenger R. R. Co. v. Young, 21 Ohio St. 518; Turner v. North Beach etc. R. R. Co. 34 Cal. 554.

3 Rounds v. Del. etc. R. R. Co. 64 N. Y. 129; Brokaw v. New Jersey R. R. etc. Co. 32 N. J. L. 328; Hewett v. Swift, 3 Allen, 420.

⁴ See *Vanderbilt v. Richmond Turnp. Co.* 2 N. Y. 479; *Owsley v. Montgomery Railway Co.* 37 Ala. 560; *Edwards v. London etc. Railw. Co.* Law R. 6 Q. B. 65; *Weed v. Panama R. R. Co.* 17 N. Y. 362; *Parker v. Erie Railw. Co.* 5 Hun, 57; *Ford v. Fitchburg R. R. Co.* 110 Mass. 240; *Ill. Cent. R. R. Co. v. Downey*, 18 Ill. 259; and see *Sheridan v. Charlick*, 4 Daly, 338.

§ 82. Trespass to property.—In general, wherever an action for an injury to the real or personal property of another will lie against an individual, a corporation will, in like circumstances, be liable for injuries committed by its agents or servants, acting within the scope of their authority.¹ A corporation is thus liable for injuries to neighboring lands caused by blasting rocks on its own lands for the construction of its works;² or for creating a nuisance resulting in damage to the property of another;³ or for the conversion of goods, and trover will lie therefor;⁴ or for the infringement of a patent,⁵ for which an action on the case will lie;⁶ and for malfeasance generally, an action on the case will lie against a corporation.⁷ A corporation was held liable to a traveler for injuries caused by an obstruction placed by it in a way which it had built and kept in repair, but which had been used by the public so as to have become a public way, although the corporation had no authority under its charter to construct the way.⁸ If a railway company constructs its line across a highway, and a carriage is damaged in consequence of the rails being too high above the surface of the roadway, the company is liable.⁹

¹ *First Baptist Church v. Schenectady etc. R. R. Co.* 5 Barb. 80; *How v. Canal Co.* 5 Har. (Del.) 245; *Louisville etc. R. R. Co. v. Faulkner*, 2 Head, 65; *Lee v. Sandy Hill*, 40 N. Y. 442; *Carman v. Steubenville etc. R. R. Co.* 4 Ohio St. 339.

² *Hay v. Cohoes Co.* 2 N. Y. 159; *Tremain v. Cohoes Co.* 2 Id. 163; *Sabin v. Vt. Cent. R. R. Co.* 25 Vt. 363.

³ *Terre Haute Gas Co. v. Teel*, 20 Ind. 131; *Delaware Canal Co. v. Commow.* 60 Pa. St. 367; *Ill. Cent. R. R. Co. v. Grabill*, 50 Ill. 241; *Ellis v. Kansas City etc. R. R. Co.* 63 Mo. 431; and see *Fenwick v. East London Railw. Co.* Law R. 20 Eq. 544.

⁴ *Beach v. Fulton Bank*, 7 Cowen, 485; *Mears v. London etc. Railw. Co.* 11 Com. B. N. S. 850; *Dunn v. Hartford etc. R. R. Co.* 43 Conn. 434.

⁵ *Poppenhusen v. New York etc. Comb Co.* 2 Fish. Pat. Cas. 62.

⁶ *Kneass v. Schuylkill Bank*, 4 Wash. C. C. 9; see *Goodyear v. Phelps*, 3 Blatchf. 91.

7 Mayor etc. v. Bailey, 3 Hill 531; 2 Denio, 433.

8 Taylor v. Boston Water Power Co. 12 Gray, 415.

9 Oliver v. Northeastern Railw. Co. Law R. 9 Q. B. 409; and see *Fash v. Third Av. R. R. Co.* 1 Daly, 148.

§ 83. **Libel, malicious prosecution, etc.**—A corporation may maintain an action for a libel upon it;¹ and a business corporation aggregate, at least, has the capacity to compose and publish a libel,² and may become liable to an action for damages by the person concerning whom the words are composed and published.³ So, an action for malicious prosecution may be maintained against a corporation aggregate.⁴ In such actions malice may be inferred from the want of probable cause, and involves nothing more than a wrongful act intentionally done.⁵ An action for a vexatious suit,⁶ or for suing out a malicious attachment,⁷ or for false imprisonment,⁸ may likewise be sustained against a corporation aggregate.⁹

1 Shoe and Leather Bank v. Thompson, 23 How. Pr. 232; 18 Abb. Pr. 413; Breunian v. Tracy; 2 Mo. App. 540; Knickerbocker Life Ins. Co. v. Ecclesine, 2 Jones & S. 76; 43 How. Pr. 201; Metrop. Saloon etc. Co. v. Hawkins, 4 Hurl. & N. 87.

2 Maynard v. Firemen's Fund Ins. Co. 34 Cal. 48.

3 Aldrich v. Press Printing Co. 9 Minn. 133; Hewitt v. Pioneer Press Co. 23 Ill. 178; Johnson v. St. Louis Despatch Co. 2 Mo. App. 563; Howe Machine Co. v. London, 53 Ga. 64; Hawkins v. New Orleans Printing Co. 29 La. An. 134; Samuels v. Evening Mail Assoc. 9 Hun, 288; Whitfield v. Southeastern Railw. Co. 1 El. B. & E. 115; Maynard v. Fireman's Fund Ins. Co. 34 Cal. 48.

4 Copley v. Grover etc. Machine Co. 2 Woods, 494; Williams v. Ins. Co. 57 Miss. 759; 34 Am. R. 44; Wheeler v. Nat. Bank, 1 Baxt. 469; 25 Am. R. 73; Vance v. Erie Railw. Co. 32 N. J. L. 334; Fenton v. Wilson Machine Co. 9 Phila. 189; Henderson v. Midland Railw. Co. 20 Week. R. 23; but compare Stevens v. Midland Railw. Co. 10 Ex. 352; Owsley v. Montgomery etc. R. R. Co. 37 Ala. 560.

5 Vance v. Erie Railw. Co. 32 N. J. L. 334; and see *Vinas v. Merchants etc. Ins. Co.* 27 La. An. 388.

6 Goodspeed v. East Haddam Bank, 23 Conn. 530.

7 Wheeler v. National Bank, 57 Tenn. 469; 25 Am. R. 732.

8 Owsley v. Montgomery etc. R. R. Co. 37 Ala. 560.

9 See *Gillett v. Missouri Valley R. R. Co.* 55 Mo. 315; *Cumberland etc. Canal Co. v. Portland*, 56 Me. 78; *Carter v. Howe Mach. Co.* 7 Reporter, 621; 51 Md. 240; 34 Am. R. 311; *Jeffersonville etc. R. R. Co. v. Rogers*, 28 Ind. 7.

§ 84. **Negligence.**—For injuries occasioned by the negligence of a servant while engaged in the business of

the master, within the scope of his employment, the latter is liable for compensatory damages,¹ and a corporation may incur this liability as well as a private person;² and exemplary damages may be allowed, where the negligence of the defendant is so gross and culpable as to evince utter recklessness.³ Such gross negligence may be established by showing that the act of the servant was authorized or ratified, or that the master employed or retained the servant, knowing that he was incompetent or from bad habits unfit for the position he occupied.⁴ An injury occasioned to a third person from the negligent manner in which the work of a corporation has been constructed or protected,⁵ renders the corporation liable for the negligence of its servants in the course of their employment, although it did not authorize or know of the particular acts complained of.⁶ So, a corporation may be held liable for negligently keeping a mischievous animal;⁷ but it must be shown that the mischievous propensity of the animal was known to some person who had control of the yard where it was kept, or of the animal itself.⁸ And a railway company is not liable for an injury to a person from the bite of a stray dog while waiting for a train at the company's station, where it is shown that the servants of the company had previously attempted to drive the dog from the premises.⁹ It is not a defense to an action against a corporation for an injury occasioned by the negligence of its servants, that the act from which the injury resulted was unauthorized by the charter, if, in any clear and explicit manner, the corporation recognized the act as done in its business.¹⁰

1 *Cosgrove v. Ogden*, 49 N. Y. 255; *Robinson v. Webb*, 11 Bush, 464; *Smith v. Read*, 6 Daly, 33.

2 *Peck v. New York Cent. R. R. Co.* 70 N. Y. 587; *Mott v. Consumers' Ice Co.* 73 Id. 543; *Snyder v. Hamilton etc. R. R. Co.* 60 Mo. 413; *Jackson v. Metrop. Railw. Co.* L. R. 2 C. P. D. 125; *Pechles v. Patapsco Guano Co.* 77 No. Car. 233; *Lewis v. St. Louis etc. R. R. Co.* 59 Mo. 495.

3 *Caldwell v. New Jersey Steamboat Co.* 47 N. Y. 282; *Cleghorn v. New York Cent. etc. R. R. Co.* 56 Id. 44; *Beale v. Railway Co.* 1 Dill. 568; *Hawes v. Knowles*, 114 Mass. 518; *Mendelsohn v. Anaheim Lighter Co.* 40 Cal. 657; *Bass v. Chicago etc. R. R. Co.* 42 Wis. 654.

4 *Cleghorn v. New York Cent. etc. R. R. Co.* 56 N. Y. 44; 111. Cent. R. R. Co. v. *Hammer*, 72 Ill. 347; *Atlantic etc. R. R. Co. v. Dunn*, 19 Ohio St. 182.

5 *Church of Ascension v. Buckhart*, 3 Hill, 193; *Ludlow v. Village of Yonkers*, 43 Barb. 493; *Stout v. Sioux City etc. R. R. Co.* 2 Dill. 294.

6 *Railroad Company v. Hanning*, 15 Wall. 649; and see *Indianapolis etc. Railw. Co. v. Anthony*, 43 Ind. 183.

7 *Baldwin v. Casella*, Law R. 7 Exch. 325; S. C. 3 Eng. R. 434; and see *Wilkinson v. Parrott*, 32 Cal. 102; *Applebee v. Percy*, Law R. 9 Com. P. 647.

8 *Stiles v. Cardiff Steamship Nav. Co.* 4 New R. 483; 33 Law J. Q. B. 310.

9 *Smith v. Great Eastern Railw. Co.* Law R. 2 Com. P. 4.

10 *Hutchinson v. Western etc. R. R. Co.* 6 Helsk. 634.

§ 85. **Wrongful acts resulting in death.**—In England,¹ and in the different states of the Union, statutes have been enacted providing for compensation for injuries resulting in death, caused by the carelessness or negligence of the servants or agents of railway and other corporations.² Generally, under these statutes, an action may be maintained for the benefit of the wife and next of kin of the deceased, by the personal representatives,³ where the party injured might have recovered damages in respect thereof, if death had not ensued.⁴ But only actual and not exemplary damages can be recovered, in the absence of special statutory regulations on the subject.⁵ In estimating damages, the jury cannot take into consideration the physical or mental sufferings of the deceased,⁶ or the sorrow, loss of society, and grief of the parties entitled to the benefit of the statute.⁷ Nor is compensation for funeral expenses, or for family mourning, recoverable.⁸ Under the California statute a jury may award exemplary damages for the death of an infant caused by negligence.⁹ Statutes giving a remedy for negligence resulting in death have no extra-territorial force;¹⁰ and, therefore, no action will lie upon a statute of this kind outside of the state enacting it.¹¹ Nor are these statutes designed to benefit the creditors of the deceased.¹² And negligence on the part of the deceased will be a bar to an action by his personal representatives, where the de-

ceased himself, if he had lived, could have maintained no action for the injury.¹³ So, if the person injured obtains satisfaction, by action, or by voluntary settlement and payment, before death ensues, the wrongful act which caused the injury, and all its consequences, past and future, are included, and the whole canceled together, and the liability of the wrongdoer is ended.¹⁴

1 See *Stats.* 9 and 10 Vict. chap. 93; 27 and 28 Vict. chap. 95.

2 See *Lankford v. Barrett*, 29 Ala. 700; *State v. Grand Trunk R. R. Co.* 60 Me. 145; 61 Id. 114; *Commonw. v. Vt. etc. R. R. Co.* 108 Mass. 7; *Kesler v. Smith*, 66 No. Car. 154; *State v. Railroad Co.* 52 N. H. 528; *Green v. Hudson River R. R. Co.* 2 Abb. Ct. App. 277; 28 Barb. 9; *Dickinson v. Northeastern Railw. Co.* 2 Hurl. & C. 735; *Osborn v. Gillett*, Law R. 8 Exch. 88.

3 *Keller v. New York Cent. R. R. Co.* 2 Abb. Ct. App. 490; 24 How. Pr. 172; *Kramer v. Market etc. R. R. Co.* 25 Cal. 434; *Andrews v. Hartford etc. R. R. Co.* 34 Conn. 57.

4 *Senior v. Ward*, 1 El. & E. 385.

5 *Penn'a R. R. Co. v. Henderson*, 51 Pa. St. 315; *Brady v. Chicago*, 4 Biss. 448; *Mitchell v. New York Cent. etc. R. R. Co.* 2 Hun, 535; *Blake v. Midland Railw. Co.* 18 Q. B. 93.

6 *Lehman v. City of Brooklyn*, 29 Barb. 234; and see *Telfer v. North. etc. R. R. Co.* 1 Vroom, 188; *Penn'a R. R. Co. v. Books*, 57 Pa. St. 339; *Blake v. Midland Railw. Co.* 18 Q. B. 93; *Grottenkemper v. Harris*, 25 Ohio St. 510.

7 *Chicago etc. R. R. Co. v. Shannon*, 43 Ill. 338; *Paterson v. Wallace*, 1 Macq. H. L. Cas. 748.

8 *Dalton v. South-eastern Railw. Co.* 4 Com. B. N. S. 296. But no deduction from the amount to which the parties may be entitled is allowed on account of any insurance on the life of the deceased: *Pittsburgh etc. R. R. Co. v. Thompson*, 56 Ill. 133; *Harding v. Townsend*, 43 Vt. 336.

9 *Myers v. San Francisco*, 42 Cal. 215; and see *Taylor v. West. Pacif. R. R. Co.* 45 Cal. 323; *Becker v. Crow*, 7 Bush, 198; *Goodsell v. Hartford etc. R. R. Co.* 33 Conn. 51. In Pennsylvania, medical and funeral expenses may be considered in assessing damages: *Cleveland etc. R. R. Co. v. Rowan*, 68 1st A. St. 393.

10 See *Selma etc. R. R. Co. v. Lacy*, 49 Ga. 106; *Mahler v. Norwich etc. Transp. Co.* 35 N. Y. 352.

11 *Richardson v. N. Y. etc. R. R. Co.* 96 Mass. 85.

12 *Whitford v. Panama R. R. Co.* 23 N. Y. 465; *Waldo v. Goodsell*, 33 Conn. 432.

13 *Tucker v. Chaplin*, 2 Car. & K. 730; *Witherley v. Regents' Canal Co.* 12 Com. B. N. S. 2; *Louisville etc. R. R. Co. v. Burke*, 6 Coldw. 45; *Wilds v. Hudson River R. R. Co.* 24 N. Y. 430.

14 *Dibble v. New York etc. R. R. Co.* 25 Barb. 183; *Reade v. Great Eastern Railw. Co.* Law R. 3 Q. B. 555.

§ 86. Liability to indictment.—A corporation cannot be guilty of an offense of which a corrupt intent is an

essential element;¹ and cannot, therefore, be indicted for felonies, as treason, murder, perjury, etc.² But beyond this, corporations are not exempt from the consequences of unlawful and wrongful acts committed by their agents in pursuance of authority derived from them,³ and they may be indicted for misfeasance, as well as for nonfeasance, as it respects duties of a public nature, enjoined by the legislature for the benefit of the public.⁴ Thus, a corporation may be indicted for misfeasance in cutting through and obstructing a public highway,⁵ or for nonfeasance in neglecting to repair a highway.⁶ And, in general, a corporation may be indicted for creating and continuing a nuisance;⁷ and it is immaterial whether the party erecting the nuisance does it ignorantly or by design, or with a good or an evil intent.⁸ The legislature has power to relieve a municipal corporation from liability for any nonfeasance or misfeasance of the city officers.⁹ An act conferring authority upon a corporation to construct a dam on its own land upon and across a river which is a highway, protects it from indictment for a nuisance in obstructing the river;¹⁰ but not from liability for overflowing the land of others, in building its dam.¹¹ If the officer or employé of a corporation, with intent to evade the provisions of the law, issue papers which the law requires to be stamped, without the proper stamps, the corporation is liable to indictment therefor.¹²

1 See *Riddle v. Proprietors etc.* 7 Mass. 163; *Cumberland etc. Co. v. Portland*, 56 Me. 77; 62 N. H. 504; *Reg. v. Great North of England Railw. Co.* 9 Q. B. 315; *Reg. v. Stephens*, Law R. 1 Q. B. 702.

2 *Riddle v. Proprietors etc.* 7 Mass. 163.

3 *State v. Ohio etc. R. R. Co.* 23 Ind. 362; *Boston etc. R. R. Co. v. State*, 32 N. H. 215; *Commonw. v. New Bedford Bridge*, 2 Gray, 339.

4 *Commonw. v. New Bedford Bridge*, 2 Gray, 339; *Louisville etc. R. R. Co. v. Commonw.* 13 Bush, 33; *State v. Morris etc. R. R. Co.* 23 N. J. L. 380; *Phillips v. Commonw.* 41 Pa. St. 197.

5 *Louisville etc. R. R. Co. v. State*, 3 Head, 523; *Reg. v. Scott*, 3 Q. B. 543; 3 Eng. Railw. Cas. 187; *Reg. v. Longton Gas Co.* 2 El. & E. 651.

6 *Syracuse etc. Plank Road Co. v. People*, 66 Barb. 25; *Red River Turnp. Co. v. State*, 1 Sneed, 474; *Commonw. v. Hopkinsville*, 7 H. Mon. 38; *Bragg v. City of Bangor*, 51 Me. 532; *Reg. v. Mayor etc.* 7 El. & B. 453; and see *State v. Dover*, 48 N. H. 452.

7 *State v. Morris etc. R. R. Co.* 23 N. J. L. 360. Compare *State v. Vermont Cent. R. R. Co.* 30 Vt. 108; *Mayor etc. v. Henley*, 3 Barn. & Ald. 77; 2 Clark & F. 331; *State v. Ohio etc. R. R. Co.* 23 Ind. 362; *State v. Manuf. Co.* 20 Me. 41.

8 *State v. Morris etc. R. R. Co.* 23 N. J. L. 360.

9 *Gray v. City of Brooklyn*, 50 Barb. 365.

10 *Hooksett v. Amoskeag Manuf. Co.* 44 N. H. 105; *Eastman v. Amoskeag Manuf. Co.* id. 143.

11 *Eastman v. Amoskeag Manuf. Co.* 44 N. H. 143.

12 *United States v. Balt. etc. R. R. Co.* 7 Am. Law Reg. N. S. 757.

§ 87. *Liability to taxation.*—Taxes are burdens or charges imposed by the legislature upon persons or property, to raise money for public purposes, or to accomplish some governmental end.¹ It is a pecuniary burden for the support of government;² and a corporation may be taxed in its business and property, with as much propriety as may an individual, unless there is something in the act by which it is constituted which exempts it from this burden.³ Houses and lands, articles of personal property, and stock owned in moneyed corporations, are among the most common subjects of taxation.⁴ And where the word "persons" occurs in tax-laws, it is presumed to include corporations.⁵ The business or franchise of a corporation created by state legislation, as well as its property, are legitimate subjects of state taxation;⁶ but a state cannot impose taxes which restrain the action of the national government, or the operation of any constitutional law of congress.⁷ A state may impose a tax, license fee, etc., upon a foreign corporation seeking to transact business within the limits of such state, as a condition of granting the privilege;⁸ but states cannot impose taxes upon the movement or transportation of goods or persons from one state to another.⁹ Double taxes are illegal and unjust, and not allowable;¹⁰ and, therefore, corporate property taxed in the hands of stockholders, is not liable to taxation in the hands of the corporation.¹¹ But a state may tax shares of capital stock invested in United States bonds, against stockholders, although it could not tax the bonds themselves.¹² A corporation

created by the co-operating legislation of two states, for the purpose of erecting a bridge over a river, the middle line of which forms the boundary between the states, and which has erected such bridge, is liable to taxation in each state for one-half of its capital and surplus.¹³ Municipal corporations created by the various states, are agencies of the state governments for the administration of local affairs, and congress has no power to tax the revenues thereof.¹⁴ Persons associated together to hold property and carry on business, but not incorporated, are not taxable as shareholders in a corporation, but as partners.¹⁵ But a joint-stock association formed under a general act is a corporation within the meaning of laws relating to taxation, and, as such, is liable to be taxed on its capital.¹⁶ Property belonging to a corporation is vested in the shareholders in their corporate capacity, and is consequently taxable in the name of the corporation.¹⁷

1 Hanson v. Vernon, 27 Iowa, 28; and see Warren v. Henly, 31 Id. 31; Sharpless v. City of Philadelphia, 21 Pa. St. 147; Hilbish v. Catherman, 64 Id. 154; Railroad Company v. Stockton, 41 Cal. 149; City of Santa Barbara v. Stearns, 51 Id. 499.

2 United States v. Railroad Co. 17 Wall. 322.

3 Shiltz v. Berks County, 6 Pa. St. 80; Bank of Penn'a v. Commonw. 19 Id. 144; State v. Commercial Bank, 7 Ham. (Ohio) 125; Monroe Savings Bank v. City of Rochester, 37 N. Y. 365; Harvard College v. Aldermen etc. 104 Mass. 470; New Orleans v. People's Bank, 27 La. An. 648.

4 See Mechanics' Bank v. Debolt, 1 Ohio St. 591; People v. Mayor etc. 6 Barb. 209; People v. Pacheco, 27 Cal. 175; Bulow v. City Council etc. 1 Nott & McC. 527; Duer v. Small, 4 Blatchf. 263.

5 Louisville etc. R. R. Co. v. Commonw. 1 Bush, 250; People v. Utica Ins. Co. 15 Johns. 353; West. Un. Tel. Co. v. Richmond, 23 Gratt. 1; Miller v. Commonw. 27 Id. 110; and see People v. Comm'rs of Taxes, 23 N. Y. 242; British etc. Ins. Co. v. Comm'rs of Taxes, 1 Keyes, 303; Inhabitants etc. v. Trustees etc. 37 Me. 349. But a state is not a "corporation" within the tax laws: State v. Atkins, 35 Ga. 316.

6 Monroe Sav. Bank v. City of Rochester, 37 N. Y. 365; and see Railroad Co. v. Maryland, 34 Md. 344; 21 Wall. 456; Richmond etc. R. R. Co. v. Brogden, 74 No. Car. 707.

7 Minot v. Phila. etc. R. R. Co. 2 Abb. U. S. 323; 18 Wall. 206; Soc. for Savings v. Colte, 6 Id. 534; Railroad Co. v. Peniston, 18 Id. 5.

8 Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566; West. Un. Tel. Co. v. Lieb, 76 Ill. 172; West. Un. Tel. Co. v. Mayer, 23 Ohio St. 521; Att.-Gen. v. Bay State Mining Co. 99 Mass. 148; British etc. Life Ins. Co. v. Comm'rs of Taxes, 31 N. Y. 32; and see Doyle v. Continental Ins. Co. 94 U. S. 535; Buffalo etc. R. R. Co. v. Commonw. 3 Brewst. 356.

9 Railroad Co. v. Maryland, 21 Wall. 456; Clarke v. Phila. etc. R. R. Co. 4 Houst. 158.

10 *Smith v. Burley*, 9 N. H. 423; *Gordon v. Mayor etc.* 5 Gill, 231; *Rex v. Churchwardens etc.* 1 East, 534; *Rex v. Vandewall*, 2 Burr. 901. Compare *State v. Collector etc.* 37 N. J. L. 258.

11 *State v. Hannibal etc.* R. R. Co. 37 Mo. 265; *Savings Bank v. City of Nashua*, 46 N. H. 389; *Bank of Cape Fear v. Edwards*, 5 Ired. 516; *State v. Cumberland etc.* R. R. Co. 40 Md. 23. Compare *Van Allen v. Assessors*, 3 Wall. 573; *People v. Assessors*, 16 Hun, 196.

12 *Building Assoc. v. Lightner*, 47 Mo. 393. Compare *Manufacturers' Ins. Co. v. Lond.*, 59 Mass. 146; *State v. Metz*, 32 N. J. L. 199; *State v. Haight*, 34 Id. 128; *Colts v. Conn. Life Ins. Co.* 36 Conn. 512; *People v. Comm'rs of Taxes*, 32 Barb. 509.

13 *State v. Metz*, 32 N. J. L. 199; *Commonw. v. Trenton Bridge Co.* 9 Am. Law Reg. 298. Compare *Eastern Bridge v. Northampton Co.* 9 Pa. St. 413.

14 *United States v. Railroad Co.* 17 Wall. 322; *The Collector v. Day*, 11 Id. 113.

15 *Hoadley v. Comm'rs of Essex*, 105 Mass. 519.

16 *Sandford v. Supervisors etc.* 15 How. Pr. 172.

17 *Balt. etc. R. R. Co. v. Supervisors*, 3 Wash. (Va.) 319; and see *People v. Assessors*, 16 Hun, 196.

§ 88. *Place of taxation.*—Land is taxable in the place where it is situated;¹ but where lands owned and occupied by a corporation are situate, partly in one township and partly in another, they will be subject to taxation in that township in which the corporation resides.² Corporations, like natural persons, are liable to be taxed for their personal property in the places where they reside.³ But this rule has respect to the corporate property as distinguished from the interests of individual stockholders; and, as to such interests, they are taxable in the places where the stockholders respectively reside.⁴ Stock of a corporation, created in one state, which is owned and held by persons residing in another state, is not subject to the taxing power of the former state.⁵

1 *Salem Iron etc. Co. v. Danvers*, 10 Mass. 514; *Carbon Iron Co. v. Carbon County*, 39 Pa. St. 231; *Nashua Sav. Bank v. Nashua*, 46 N. H. 389; *People v. Assessors*, 39 N. Y. 81; *Tremont Bank v. City of Boston*, 1 Cush. 142.

2 *State v. Warford*, 37 N. J. L. 397; and see *People v. Oswego*, 6 Thomp. & C. 673.

3 *Union Bank v. State*, 9 Yerg. 490; *Mohawk etc. R. R. Co. v. Clute*, 4 Paige, 384; *McKeen v. Northampton County*, 49 Pa. St. 519; *Orange etc. R. R. Co. v. City Council etc.* 17 Gratt. 176; *State v. Ill. Cent. R. R. Co.* 27 Ill. 64; *Jones v. Bridgeport*, 36 Conn. 233; *Middletown Ferry Co. v. Middletown*, 40 Id. 65; and see *McHarg v. Eastman*, 4 Robt. 635; *Metcalf v. Messenger*, 46 Barb. 325; *People v. Bay State etc. Co.* 17 Hun, 204; *People v. Comm'rs etc.* 46 How. Pr. 316.

4 *Conwell v. Town of Connersville*, 15 Ind. 150; *Nashua Sav. Bank v. Nashua*, 46 N. H. 389; *Smith v. Exeter*, 37 Id. 556; and see *Auditor etc. v. New Albany etc.* R. R. Co. 11 Ind. 550.

5 *Union Bank v. State*, 9 Yerg. 490; and see *Railroad Co. v. Pennsylvania*, 15 Wall. 300.

§ 89. **Modes of valuation and assessment.**—A state has power to tax the property, real and personal, of all the corporations within its borders, the same as it may tax similar property belonging to natural persons, and it may do this upon a valuation, or on the principle of an excise tax;¹ but a state has not the power to tax both the capital stock, and also the real and personal property of a corporation.² If it elects to tax the property, the rule of uniformity of taxation requires that the assessment shall be at the same rate as all other property in the state.³ But the tax law of a state is not objectionable merely because it prescribes a different rule of taxation for corporations from that for individuals;⁴ and corporate taxation, and the place and parties to be taxed, are matters which are now generally regulated by statute.⁵ Under the California tax-laws, a railroad is taxed as real estate, the portion situate in each county being assessed in that county as so much land.⁶ In Tennessee, a railroad is not to be estimated as so much land used for farming purposes, but according to its value as a railway.⁷ In Rhode Island, rails, sleepers, bridges, etc., of a railroad company, together with the easement in the lands within the limits of the road, are real estate, and taxable as such in the towns through which the road passes.⁸ In New York, the real estate of railroad corporations, occupied and used by them for railroad purposes, cannot properly be assessed as "non-resident lands";⁹ for the purposes of taxation, the corporation is to be deemed a resident of each town and county through which its road passes,¹⁰ and each piece of property is to be estimated in connection with its position, its incidents, and the business and profits to be derived therefrom.¹¹ Railroad property in Kentucky, including depot grounds, buildings, etc., cannot be taxed by

the counties.¹² Under the revenue law of Missouri, not only the original, but also the subsequently acquired capital stock of a private corporation, is liable to taxation.¹³ The rolling stock of a railway company existing under the laws of another state, but used over a portion of the road extending into Iowa, is liable to taxation in the latter state.¹⁴ A part of the public lands granted by congress to aid the construction of a railroad, is not liable to state taxation, until the company has complied with the conditions of the grant, and has become entitled to a patent.¹⁵ Town lots, over which a railroad company has the right of way, may be taxed as right of way, but this precludes them from being also taxed as town or city lots.¹⁶ Slack-water companies are included as liable to a tax on "transportation" companies.¹⁷ And property devised to a corporation is liable to a tax imposed by statute on "property of any decedent which passes to any person other than" specified relatives.¹⁸ By virtue of the right to tax the franchises of corporations,¹⁹ the gross receipts may be resorted to as the measure of probable value.²⁰ And a state tax imposed on the gross receipts of a railroad, telegraph, or express company, is not void as being a tax on commerce between the states, though such receipts are principally made up from freights, or from the transmission of messages pertaining to such commerce.²¹ If the charter provides a specific mode of taxation, this excludes all other modes.²²

1 *Provident Institution v. Massachusetts*, 6 Wall. 611; *Thomason v. Pacif. R. R. Co.* 9 Id. 579; *Reading R. R. Co. v. Penn'a* 15 Id. 284; *Portland Bank v. Apthorp*, 12 Mass. 252; *Boston etc. R. R. Co. v. Commonw.* 100 Mass. 399.

2 *State v. Cumberland etc. R. R. Co.* 40 Md. 22.

3 *Chicago etc. R. R. Co. v. Supervisors of Boone*, 44 Ill. 240; *State v. Cumberland etc. R. R. Co.* 40 Md. 22; and see *Cheshire v. Commissioners etc.* 118 Mass. 386; *Mayor etc. v. Stonewall Ins. Co.* 53 Ala. 570; *People v. Whyler*, 41 Cal. 351; *Emery v. Gas Company*, 28 Id. 345.

4 *State Railroad Tax Cases*, 92 U. S. 575.

5 See *Coite v. Soc. for Savings*, 32 Conn. 173; *Cumberland etc. Railway v. Portland*, 37 Me. 444; *People v. Assessors etc.* 33 N. Y. 81; *St. Louis etc. Life Ins. Co.* 47 Mo. 432; *Chicago etc. R. R. Co. v. Paddock*, 75 Ill. 616; *Cincinnati etc. Co. v. State*, 18 Ohio St. 237; *Commissioners etc. v. Citizens' Nat. Bank*, 23 Minn. 280; *Reg. v. Leith*, 1 El. & B. 121.

6 *Huntington v. Cent. Pacif. R. R. Co.* 2 Sawyer, 503; and see *Tax Cases*, 12 Gill & J. 117; *Albany etc. R. R. Co. v. Town of Canaan*, 16 Barb. 244.

7 *Louisville etc. R. R. v. State*, 8 Heisk. 663; see also *Illinois v. Ill. Cent. R. R. Co.* 27 Ill. 64.

8 *Providence etc. R. R. Co. v. Wright*, 2 R. I. 459; and see *Goodell Manuf. Co. v. Trask*, 11 Pick. 513; *Salem Iron Factory Co. v. Inhabitants etc.* 10 Mass. 514; *State v. Metz*, 31 N. J. L. 378; *Fitchburg R. R. Co. v. Prescott*, 47 N. H. 62.

9 *People v. Barker*, 48 N. Y. 70.

10 See *Sherwood v. Saratoga etc. R. R. Co.* 15 Barb. 650; *People v. Beardsley*, 52 Id. 105; *Glovie v. So. Car. R. R. Co.* 1 Strob. 70.

11 *Buffalo etc. R. R. Co. v. Supervisors etc.* 48 N. Y. 93.

12 *Louisville etc. R. R. Co. v. Warren County*, 5 Bush, 243.

13 *St. Louis etc. Life Ins. Co. v. Charles*, 47 Mo. 462.

14 *Dubuque v. Ill. etc. R. R. Co.* 39 Iowa, 56; and see *Pittsburgh etc. R. R. Co. v. Commonwealth*, 66 Pa. St. 73; *Minot v. Phila. etc. R. R. Co.* 18 Wall. 206; 2 Abb. U. S. 323.

15 *Cent. Pacif. R. R. Co. v. Howard*, 51 Cal. 229; compare *Tucker v. Ferguson*, 22 Wall. 527.

16 *Chicago etc. R. R. Co. v. Miller*, 72 Ill. 144.

17 *Commonw. v. Monongahela Nav. Co.* 66 Pa. St. 81.

18 *Miller v. Commonw.* 27 Gratt. 110.

19 See *Richmond etc. R. R. Co. v. Brogden*, 74 No. Car. 707.

20 *Reading R. R. Co. v. Peun'a*, 15 Wall. 284; see *People v. Mayor of Brooklyn*, 6 Barb. 209.

21 *Reading R. R. Co. v. Penn'a*, 15 Wall. 284; *Southern Express Co. v. Hood*, 15 Rich. 66; *Walcott v. People*, 17 Mich. 68; *West. Un. Tel. Co. v. Mayer*, 28 Ohio St. 531; and see *Ins. Co. v. Commonw.* 87 Pa. St. 173; 30 Am. R. 352.

22 *New York etc. R. R. Co. v. Sabin*, 26 Pa. St. 242.

§ 90. Exemption from liability to taxation.—

Unless the constitution of a state forbids it,¹ the legislature has the power to grant a corporation an exemption from taxation;² but such a grant, to be operative, must be expressed in clear and unquestionable terms, and the language of the grant should be strictly construed against the party to be benefited thereby;³ unless an equivalent for the taxes exempted is by the same statute required to be paid by the corporation, in which case, it should be liberally construed in favor of the corporation.⁴ An exemption from taxation conferred by charter forms a part of the contract between the state and the corporation, which cannot be impaired by future legislatures;⁵ but an exemption from taxation not forming a part of such con-

tract may be repealed.⁶ And an act of the legislature exempting corporate property from taxation is not a "contract" which exempts it, unless there be a consideration for the act.⁷ An exemption granted in general terms presumably remits only state taxes, and does not preclude taxes for municipal purposes.⁸ An exemption from taxation for "municipal purposes" does not preclude a tax for school purposes.⁹ So, an exemption from "public taxes" generally operates only to remit taxes pertaining to the public revenue, and does not extend to local municipal taxes.¹⁰ An exemption "from taxation of every kind," in the charter of a hospital, does not include special assessments against the property for the improvement of the street on which it fronts.¹¹ An exemption from taxation of all property "suitable and proper for carrying into execution the powers granted," leaves the courts to determine the question of necessity in each given case.¹² A charter providing for the payment of a certain sum by the corporation, and then enacting "that no further or other tax or impost shall be levied or assessed upon said company," exempts the company generally from all taxes for county or other purposes than those stated in the charter.¹³ A statute exempting all the property of a railroad company from taxation includes its franchise;¹⁴ but not property held by the corporation as a mere convenience;¹⁵ or lands which the corporation holds for sale.¹⁶ A constitutional prohibition of an exemption of corporate property from taxation impliedly forbids the renewal of an exemption which has expired or become merged.¹⁷ The payment of a license fee, bonus, or tax, imposed upon a corporation as a condition of granting or permitting it to exercise its franchises, is not necessarily an implied prohibition of any other burden or tax to be imposed by the state.¹⁸ Nor does the assignee of the franchises of a corporation become invested with an exemption from taxes granted to the former company.¹⁹ And where corporations are con-

solidated, whatever property of either was previously taxable continues liable to taxation after the consolidation.²⁰ But the consent of a corporation to a special tax, or to a particular mode of assessment, will not impair a grant of exemption from general taxes.²¹

1 See *State v. Northern etc. R. R. Co.* 44 Md. 131; *City of Davenport v. Chicago etc. R. R. Co.* 38 Iowa, 633; *North-western University v. People*, 80 Ill. 333.

2 *Bank of Illinois v. People*, 4 Scam. 303; *Minot v. Phila. etc. R. R. Co.* 13 Wall. 206; see *People v. Comm'rs of Taxes*, 23 N. Y. 132.

3 *People v. Whyler*, 41 Cal. 351; *State v. Town Council*, 12 Rich. 339; *West Wisconsin R. R. Co. v. Supervisors*, 93 U. S. 555; *Northampton County v. Lehigh Coal etc. Co.* 75 Pa. St. 461; *Comm'rs etc. v. Brackenridge*, 12 Kan. 114; *Mayor etc. v. Cent. R. R. Co.* 50 Ga. 620; *State v. Woodruff*, 37 N. J. L. 133; *Bakewell v. Police Jury*, 20 La. An. 334; *Hannibal etc. R. R. Co. v. Shacklett*, 50 Mo. 530.

4 *Milwaukee etc. R. R. Co. v. Supervisors*, 29 Wis. 116; and see *Daughdrill v. Ala. Life Ins. etc. Co.* 31 Ala. 91; *Farmers' Bank v. Commonw.* 6 Bush, 127. The intention to exempt corporate property from taxation must be clear: *Hoge v. Railroad Co.* 99 U. S. 348.

5 *Johnson v. Commonw.* 7 Dana, 333; *Neustadt v. Ill. Cent. R. R. Co.* 31 Ill. 434; *Ruleigh etc. R. R. Co. v. Reid*, 13 Wall. 239; *Central Railroad etc. v. Georgia*, 92 U. S. 665; *Hewitt v. N. Y. etc. R. R. Co.* 12 Blatchf. 452; *Washington University v. Rouse*, 8 Wall. 439; *State v. Comm'rs etc.* 37 N. J. L. 240; *Oliver v. Memphis etc. R. R. Co.* 30 Ark. 123. But see *Debolt v. Ohio Life Ins. Co.* 1 Ohio St. 557; *Brewster v. Hough*, 10 N. H. 138; *Sandusky Bank v. Wilbor*, 7 Ohio St. 481; *Mott v. Penn'a R. R. Co.* 30 Pa. St. 9.

6 *Lord v. Town of Litchfield*, 33 Conn. 116; *Louisville etc. R. R. Co. v. Commonw.* 10 Bush, 43; *St. Louis etc. R. R. Co. v. Loftin*, 30 Ark. 693.

7 *Home of Friendless v. Rouse*, 8 Wall. 430; *Tucker v. Ferguson*, 22 Id. 527; *West Wisconsin R. R. Co.* 93 U. S. 595.

8 *Matter of Mayor etc.* 11 Johns, 77; *Baptist Church v. McAtee*, 8 Bush, 508; *Insurance Co. v. New Orleans*, 1 Woods, 85.

9 *Root v. Erdelneyer*, 37 Ind. 225.

10 *Morgan v. Cree*, 45 Vt. 773; and see *Taylor v. Palmer*, 31 Cal. 240; *Egyptian Levee Co. v. Hardin*, 37 Mo. 425; *Pray v. Northern Liberties*, 31 Pa. St. 69; *Boston etc. Soc. v. Mayor etc.* 116 Mass. 181; *Paine v. Spradley*, 5 Kan. 523; *Lafayette v. Male Orphan Asylum*, 4 La. An. 1.

11 *Sheehan v. Good Samaritan Hospital*, 50 Mo. 155; and see *Brightman v. Kirner*, 23 Wis. 54; *Baltimore v. Cemetery Co.* 7 Md. 517; *Emery v. Gas Co.* 23 Cal. 345; *Harlem Presbyterian Church v. Mayor etc.* 5 Hun, 442; *Paterson v. Society etc.* 4 Zab. 385; *Matter of College Street*, 8 R. I. 474; *Bridgeport v. N. Y. etc. R. R. Co.* 36 Conn. 255.

12 *State v. Woodruff*, 36 N. J. L. 94; and see *Balt. etc. R. R. Co. v. Supervisors etc.* 3 W. Va. 320.

13 *Camden etc. R. R. Co. v. Hillegas*, 3 Har. (Del.) 11; and see *State v. Minton*, 3 Zab. 529.

14 *Wilmington R. R. v. Reid*, 13 Wall. 264.

15 *Lackawanna Iron Co. v. Luzerne County*, 42 Pa. St. 424; *Gardner v. State*, 1 N. J. 557; *Inhabitants of Worcester v. Western Railw. Co.* 4 Met. 564; *Railroad Co. v. Berks County*, 6 Pa. St. 70; *State v. Comm'rs of Mansfield*, 3 Zab. 510; and see *People v. Cemetery Co.* 86 Ill. 336; 29 Am. R. 32.

16 *Illinois etc. R. R. Co. v. Irwin*, 73 Ill. 452; *Richmond etc. R. R. Co. v. Comm'rs*, 78 N. C. 212; *State v. Hancock*, 35 N. J. L. 537; *Milwaukee etc. R. R. Co. v. Milwaukee*, 34 Wis. 271; *Ordinary etc. v. Central R. R. Co.* 40 Ga. 648; *Mobile etc. R. R. Co. v. Moseley*, 52 Miss. 127; *Tucker v. Ferguson*, 22 Wall. 527; and see *Portland etc. R. R. Co. v. Saco*, 60 Me. 197.

17 *Trask v. Maguire*, 18 Wall. 391.

18 *Union etc. Railw. Co. v. Philadelphia*, 83 Pa. St. 429; *Erie Railw. Co. v. Commonw.* 66 Id. 84; 5 Am. R. 351; *Minot v. Phila. etc. R. R. Co.* 2 Abb. N. S. 323; 18 Wall. 208; *New Orleans v. People's Ins. Co.* 27 La. An. 519; *Louisville etc. R. R. Co. v. Commonw.* 10 Bush. 43.

19 *Evansville R. R. Co. v. Commonw.* 9 Bush. 439; *Morgan v. Louisiana*, 93 U. S. 217; and see *Stevens v. N. Y. etc. R. R. Co.* 13 Blatchf. 104. Compare *Atlantic etc. R. R. Co. v. Allen*, 15 Fla. 637.

20 *Chesapeake etc. R. R. Co. v. Virginia*, 94 U. S. 718.

21 *State v. Commissioner etc.* 37 N. J. L. 240. Exemption of a corporation from taxation is not a corporate franchise: *State v. Maine Cent. R. R. Co.* 68 Me. 488.

CHAPTER VIII.

EMINENT DOMAIN.

- § 91. Definition and nature of.
- § 92. Delegation of the power to corporations.
- § 93. Property must be taken for a public use.
- § 94. What property liable to eminent domain.
- § 95. Nature of title or interest acquired.
- § 96. Owner entitled to compensation.
- § 97. What acts, etc., constitute a "taking."

§ 91. Definition and nature of.—The right of eminent domain is the right possessed by the state, as a necessary attribute of its sovereignty, to resume the possession of private property for public use.¹ The right is founded upon the principle, that individual interests must be subservient to those of the public, and must yield when the public exigency requires;² and all grants of land whether made by a state or by an individual, are subject to the right of eminent domain, unless it is expressly relinquished.³ It is no objection to the exercise of the right, that lands, equally feasible, could be obtained by purchase;⁴ and neither the fact that the property is held under a mortgage, nor that it belongs to a corporation chartered by a state law, exempts it from the operation of the principle of eminent domain;⁵ so that the propriety of exercising the power of eminent domain is not a judicial question, but one of political sovereignty, to be determined by the legislature;⁶ and the legislature are the exclusive judges of the degree and quality of interest proper to be taken and dedicated to the public use, as well as the necessity of taking it.⁷ But the power is to be exercised only when the public exigencies require it, and if the legislature attempts to take property confessedly not for public use, the courts may interfere and prevent it.⁸ The

power of eminent domain belongs to the United States government as well as to a state government;⁹ and the only restraints upon the exercise of the power are, the necessity arising in order to promote the public interest,¹⁰ and that private property shall not be taken without just compensation.¹¹

1 *Weir v. St. Paul etc. R. R. Co.* 18 Minn. 155; *Pennsylvania v. Wheeling Bridge Co.* 13 How. 518; *Richardson v. Vt. Cent. R. R. Co.* 25 Vt. 465; *American Print Works v. Lawrence*, 3 Zab. 9; *People v. Mayor etc.* 32 Barb. 102; *Brown v. Beatty*, 34 Miss. 227.

2 *Beekman v. Saratoga etc. R. R. Co.* 3 Paige, 45; *Ash v. Cummings*, 50 N. H. 591; *Enfield Toll Bridge Co. v. Hartford etc. R. R. Co.* 17 Conn. 40.

3 *Illinois etc. Canal v. Chicago etc. R. R. Co.* 14 Ill. 314; and see *California Tel. Co. v. Alta Tel. Co.* 22 Cal. 398; *Matter of N. Y. Cent. etc. R. R. Co.* 77 N. Y. 248.

4 *Giesy v. Cincinnati etc. R. R. Co.* 4 Ohio St. 308; and see *Lamb v. North London Railw. Co.* Law R. 4 Ch. App. 522.

5 *Alabama etc. R. R. Co. v. Kenny*, 39 Ala. 397; *Peoria etc. R. R. Co. v. Peoria and Springfield R. R. Co.* 66 Ill. 174; *Matter of Buffalo*, 68 N. Y. 167; *N. Y. etc. R. R. Co. v. Boston etc. R. R. Co.* 26 Conn. 196; *Crosby v. Hanover*, 36 N. H. 404.

6 *People v. Smith*, 21 N. Y. 595; *Beekman v. Saratoga etc. R. R. Co.* 3 Paige, 45.

7 *De Varaigne v. Fox*, 2 Blatchf. 85; *Tide-Water Co. v. Coester*, 18 N. J. Eq. 518. But the courts are also to judge of the necessity under the general railroad act in New York: *Matter of N. Y. Cent. R. R. Co.* 66 N. Y. 407.

8 *Water Works Co. v. Burkhart*, 41 Ind. 364; *Giesy v. Cincinnati etc. R. R. Co.* 4 Ohio St. 308; *Talbot v. Hudson*, 16 Gray, 417; and see *Matter of Deansville Cemetery Assoc.* 68 N. Y. 669; *Speers v. Blairsville*, 50 Pa. St. 150; *People v. Salem*, 20 Mich. 452.

9 *Kohl v. United States*, 91 U. S. 367; see *Warren v. First Division etc.* 18 Minn. 384.

10 *East Tenn. etc. R. R. Co. v. Love*, 3 Head, 63; *Giesy v. Cin. etc. R. R. Co.* 4 Ohio St. 308; *San Francisco etc. R. R. Co. v. Caldwell*, 31 Cal. 367; *Olcott v. Supervisors*, 16 Wall. 678; *Bloomfield Gas Co. v. Richardson*, 63 Barb. 437; *Gray v. Liverpool etc. Railw. Co.* 9 Beav. 391.

11 *Withers v. Buckley*, 20 How. 84; *Bohlman v. Green Bay etc. R. R. Co.* 30 Wis. 105; *Colton v. Ross*, 9 Cal. 595; *Avery v. Fox*, 1 Abb. U. S. 246; *Cameron v. Supervisors*, 47 Miss. 264.

§ 92. Delegation of the power to corporations.—

The power of eminent domain may be exercised by the state itself, or the state may, in its discretion, exercise the power through its public officers, or agents, or through public or private corporations, or private individuals.¹ Thus, corporate bodies have been authorized to take pri-

vate property for the purpose of making public highways, turnpike roads and canals, of erecting wharves and basins, of establishing ferries, of draining swamps and marshes, and of bringing water to cities and villages.² So, it is well established, that the legislature may authorize railroad companies to take the necessary private property to the use of their roads *in invitum*.³ And the delegation of the power may be made by a general act providing for the creation of an indefinite number of corporations;⁴ and the agency employed may even be a corporation created under the laws of another state.⁵ But statutes delegating the right of eminent domain to corporations are not to be extended by implication, and must be strictly complied with;⁶ and the power granted must be strictly pursued.⁷ If a doubt remains as to the extent of the power after all reasonable intendments in its favor, it will be solved adversely to the claim of power.⁸ Authority in a city charter to "take private property for opening, altering and laying out any street, lane, avenue, alley, public square, or other public grounds," confers no power to condemn property on which to erect a city prison.⁹

1 West River Bridge Co. v. Dix, 6 How. 507; Harbeck v. Toledo, 11 Ohio St. 219; Mercer v. Pittsburg etc. R. R. Co. 36 Pa. St. 99; Ash v. Cummings, 50 N. H. 591; Weir v. St. Paul etc. R. R. Co. 18 Minn. 155; In re Fowler, 53 N. Y. 60; Eastern R. R. Co. v. Boston etc. R. R. 111 Mass. 125; 15 Am. R. 13.

2 Beekman v. Saratoga etc. R. R. Co. 3 Paige, 44, 73; Johnson v. Utica Water Works Co. 67 Barb. 415; Inhabitants of Wayland v. County Commissioners, 4 Gray, 500; Reddall v. Bryan, 14 Md. 444; Petition of Mt. Washington Road Co. 35 N. H. 134; Hildreth v. City of Lowell, 11 Gray, 345; Reeves v. Wood County, 8 Ohio St. 333; Harrington v. Neuse River etc. Co. 69 No. Car. 103; Curry v. Mt. Sterling, 15 Ill. 320; East St. Louis v. St. John, 47 Ill. 463; Patterson v. Miss. etc. Boom Co. 3 Dill. 465; Re Corp. of Huddersfield etc. Law R. 10 Ch. App. 92.

3 Brown v. Beatty, 34 Miss. 227; Secombe v. Railroad Co. 23 Wall. 108; Bradley v. New York etc. R. R. Co. 21 Conn. 294; Scudder v. Trenton Falls Co. Saxt. Ch. 694; Swan v. Williams, 2 Mich. 427; Gray v. Liverpool etc. Railw. Co. 9 Beav. 391.

4 Buffalo etc. R. R. Co. v. Brainard, 9 N. Y. 100.

5 Matter of Townsend, 39 N. Y. 171.

6 Trumpler v. Bernerly, 39 Cal. 490; New York etc. R. R. Co. v. Kip, 46 N. Y. 646; Iron R. R. Co. v. Ironton, 17 Ohio St. 299; People v. Brighton, 10 Mich. 57; Leslie v. St. Louis, 47 Mo. 474; Dennis v. Hughes, 8 Up. Can. Q. B. 444.

7 *State v. Jersey City*, 1 *Dutch*. 309; *Proprietors v. Nashua etc. R. R. Co.* 104 *Mass.* 1; *Webb v. Manchester etc. Railw. Co.* 4 *Myline & C.* 116; *Lee v. Milner*, 2 *Mees. & W.* 824.

8 *New York etc. R. R. Co. v. Kip*. 46 *N. Y.* 546.

9 *East St. Louis v. St. John*, 47 *Ill.* 463; and see *West River Bridge Co. v. Dix*, 6 *How.* 507, 545.

§ 93. Property must be taken for a public use.

—The basis of the enforcement of the right of eminent domain is the necessity for the public use of the property, the taking of which is sought;¹ and the legislature cannot provide for the appropriation of private property to a mere private enterprise, in which the public clearly have no interest.² But in order to constitute a public use, it is not necessary that the proposed improvement should directly benefit the people of the whole state;³ it is sufficient, although the direct public benefit contemplated be confined to a particular community.⁴ The objects and purposes of railroads, though operated by private companies, are of a public character and in furtherance of public interests;⁵ and, as fostering the public use, aid may be extended to the construction of such roads by means of the power of eminent domain, under legislative permission.⁶ Draining for sanitary purposes is a public use;⁷ so, land taken, in a city, for public parks and squares, by authority of law, whether advantageous to the public for recreation, health, or business, is taken for a public use;⁸ and, in some of the states, statutes authorizing manufacturing corporations to flow back water on land, have been sustained on the ground that the means of promoting manufactures was a public use.⁹ Taking private property for the purpose of supplying towns and cities with pure water, is clearly a public use.¹⁰ But the use of lands for the purposes of rural cemetery associations is private, not public, and a statute authorizing the taking of lands for the purposes of such an association, by proceeding *in invitum*, is unconstitutional and void.¹¹

1 *Richardson v. Vt. Cent. R. R. Co.* 25 *Vt.* 465; *Bankhead v. Brown*, 25 *Iowa*, 540; *Young v. Harrison*, 6 *Ga.* 130; *Leisse v. St. Louis etc. R. R. Co.* 2 *Mo. App.* 105.

2 *Brown v. Beatty*, 34 Miss. 227; *Memphis Freight Co. v. Memphis*, 4 Cold. 419.

3 See *United States v. Bridge Co.* 6 McLean, 517; *Copeland v. Packard*, 16 Pick. 217; *Mayor etc. v. Bailey*, 2 Denio, 433.

4 *Matter of Bloomfield Gas Light Co. v. Richardson*, 63 Barb. 437.

5 *Bradley v. N. Y. etc. R. R. Co.* 21 Conn. 294; *Bloodgood v. Mohawk etc. R. R. Co.* 18 Wend. 9; *Gibson v. Alason*, 5 Nev. 283; *San Francisco etc. R. R. Co. v. Caldwell*, 31 Cal. 367.

6 *Rensselaer etc. R. R. Co. v. Davis*, 43 N. Y. 137; *Shipley v. Balt. etc. R. R. Co.* 34 Md. 336; *Stockton etc. R. R. Co. v. Stockton*, 41 Cal. 147; *Reed v. Louisville Bridge Co.* 8 Bush. 69; *Lodge v. Phila. etc. R. R. Co.* 8 Phila. 345.

7 *Dingley v. Boston*, 100 Mass. 544; *Paterson v. Baumer*, 43 Iowa, 477; *Draining Co. Case*, 11 La. An. 338; *Sessions v. Crunkilton*, 20 Ohio St. 349; *Anderson v. Kearns Draining Co.* 14 Ind. 199.

8 *Park Comm'rs v. Williams*, 51 Ill. 57; *Matter of Comm'rs etc.* 63 Barb. 282; *Brooklyn Park Comm'rs v. Armstrong*, 45 N. Y. 234; see *State v. Lemingwell*, 54 Mo. 458; *Higginson v. Inhabitants of Nahant*, 11 Allen, 530.

9 See *Todd v. Austin*, 34 Conn. 78; *Great Falls Manuf. Co. v. Fernald*, 47 N. H. 444; *Armond v. Green Bay etc. Canal Co.* 31 Wis. 316; *Boston Mill Dam Co. v. Newman*, 12 Pick. 467; *Sadler v. Langham*, 34 Ala. 311; *Att.-Gen. v. Ewart Booming Co.* 34 Mich. 482; *West Va. Transp. Co. v. Oil Co.* 5 Va. 382; but see *Hay v. Cohoes Co.* 3 Barb. 42, 47; *Tyler v. Beecher*, 44 Vt. 648; *Loughbridge v. Harris*, 43 Ga. 500.

10 *Burden v. Stein*, 27 Ala. 104; *Kane v. City of Baltimore*, 15 Md. 240; *Inhabitants of Wayland v. County Comm'rs*, 4 Gray, 500; *Gardner v. Trustees of Newburg*, 2 Johns. Ch. 162.

11 *Matter of Deansville Cemetery Assoc.* 66 N. Y. 569; but compare *Balch v. County Comm'rs*, 103 Mass. 106.

§ 94. What property liable to eminent domain.

If the public good requires, all kinds of property are alike subject to the right of eminent domain;¹ even contracts and legislative grants, which are beyond the reach of ordinary legislation, are not exempt.² Thus, the powers and privileges of a corporation, including everything which constitutes its franchise, are subject to the same sovereign right of eminent domain, by which the property and rights of individuals are liable to be taken and appropriated to a public use.³ The exclusive right to maintain a toll-bridge within certain limits is a franchise which may be appropriated for the public good, upon just compensation being made therefor.⁴ So, the lands of a railway company, not actually in use, or not absolutely necessary for the enjoyment of its franchises, are subject to be taken under the exercise of the right of eminent

domain.⁵ And the right of eminent domain may be exercised even over land which the federal government holds as general proprietor;⁶ but when it is the intention of the legislature to grant a power to take land already appropriated to another public use, such intention must be shown by express words or by necessary implication.⁷ The intention will not be implied from a grant of power to take property, made in general terms.⁸

1 *Crosley v. Hanover*, 36 N. H. 404; *Brocket v. Ohio etc. R. R. Co.* 14 Pa. St. 241; *Watkins v. Walker Co.* 18 Tex. 535; *Morris v. Schalls-ville etc. Railw. Co.* 4 Bush. 418; *Wells v. Somerset etc. Railw. Co.* 47 Me. 345; *Stone v. Commercial Railw. Co.* 9 Sim. 621.

2 *Piscataqua Bridge v. New Hamp. Bridge*, 7 N. H. 35; *Bonaparte v. Camden etc. R. R. Co.* 1 Bald. 205; *James River etc. Co. v. Thompson*, 3 Gratt. 270; *New York etc. R. R. Co. v. Boston etc. R. R. Co.* 38 Conn. 196; *White River Turnp. Co. v. Vt. Cent. R. R. Co.* 21 Vt. 550.

3 *Richmond etc. R. R. Co. v. Louisa R. R. Co.* 13 How. 71; *West River Bridge Co. v. Dix*, 6 Id. 507; *Central Bridge Co. v. City of Lowell*, 4 Gray, 414; *Armington v. Town of Barnet*, 15 Vt. 745; and see *Noll v. Dubuque etc. R. R. Co.* 32 Iowa, 68; *Sixth Av. R. R. Co. v. Kerr*, 72 N. Y. 330.

4 *Enfield Toll Bridge Co. v. Hartford etc. R. R. Co.* 17 Conn. 40; *Red River Bridge Co. v. Mayor etc.* 1 Sneed, 176; *Central Bridge Corp. v. City of Lowell*, 15 Gray, 106.

5 *Peoria etc. R. R. Co. v. Peoria and Springfield R. R. Co.* 68 Ill. 174; and see *Bellona Co's. Case*, 3 Bland, 442; *New York etc. R. R. Co. v. Boston etc. R. R. Co.* 38 Conn. 196; *Grand Rapids etc. R. R. Co. v. Grand Rapids etc. R. R. Co.* 35 Mich. 265; *State v. Easton etc. R. R. Co.* 36 N. J. L. 181; *Worcester etc. R. R. Co. v. Railroad Comm'rs*, 118 Mass. 561.

6 *United States v. Bridge Co.* 6 McLean, 517.

7 *Inhabitants of Springfield v. Conn. River R. R. Co.* 4 Cush. 63; *Little Miami etc. R. R. Co. v. Dayton*, 23 Ohio St. 510; *Hickok v. Hine*, 23 Id. 523; *Boston etc. R. R. Co. v. Lowell etc. R. R. Co.* 124 Mass. 365; *State v. Montclair R. R. Co.* N. J. L. 328; *New York etc. R. R. Co. v. Boston etc. R. R. Co.* 38 Conn. 116; *Cleveland etc. R. R. Co. v. Speer*, 56 Pa. St. 325.

8 *Matter of Buffalo*, 68 N. Y. 167; *Matter of N. Y. Cent. etc. R. R. Co.* 77 Id. 248; *Matter of N. Y. etc. R. R. Co.* 20 Hun, 201.

§ 95. Nature of title or interest acquired.—The general rule in respect to property acquired by the exercise of the right of eminent domain is, that the title thereto remains in the former owner, subject to the use of the corporation for the purposes authorized;¹ and when the particular use for which the property was taken is discontinued and abandoned, the owner is entitled to resume the possession thereof;² and he cannot be de-

prived of this reversionary interest by the act of the corporation, nor by legislative enactment, without compensation.³ But if the use requisite to the public is such as to require the whole thing, the same principle which gives to the public the right to any use, gives the right to the entire use, upon paying adequate compensation for the whole.⁴ So, corporations, though limited in their duration, may purchase and hold land in fee;⁵ and the property so acquired may, by the authority of the legislature, be devoted to a new and different public use, after the use for which it was originally acquired has been terminated, or the land may be aliened by the corporation.⁶ In such cases, the original owner has received compensation for, or has voluntarily granted, the whole fee, and he has no reversionary or other interest in the land.⁷ In construing a statute authorizing the taking of private property for public use, it will not be implied that a greater interest or estate can be taken than is absolutely necessary to satisfy the language and object of the act;⁸ and in the absence of express words, a fee will not be deemed to be taken, where the purposes of the act will be satisfied by the taking of an easement.⁹ But the legislature has the constitutional power to authorize the entire interest of the owner to be taken for public use, upon the payment of a just compensation, if it deem the public exigency requires it.¹⁰

1 *Doocaston v. Payne*, 2 Black.H. 527; *State v. New Boston*, 11 N. H. 407; *Blake v. Rich*, 34 Id. 282; *Rust v. Low*, 6 Mass. 90; *Ala. etc. R. R. Co. v. Burkett*, 43 Ala. 83; *Morris v. Scholville etc. Turnp. Road*, 6 Bush. 671; *Giesy v. Cincinnati etc. R. R. Co.* 4 Ohio St. 308; *Strong v. Brooklyn*, 63 N. Y. 1; *People v. Lawrence*, 54 Barb. 589; and see *Hasson v. Oil Creek etc. R. R. Co.* 8 Phila. 536.

2 *Gravel Road Co. v. Benfroee*, 58 Mo. 265; *Hastings v. Burlington etc. R. R. Co.* 38 Iowa, 316; *Kellogg v. Malin*, 50 Mo. 436; and see *Proprietors etc. v. Nashua*, 104 Mass. 1; *Pinkerton v. Boston etc. R. R. Co.* 109 Id. 57.

3 *Heard v. City of Brooklyn*, 60 N. Y. 242.

4 *Railroad Company v. Davis*, 2 Dev. & B. 467; and see *Giesy v. Chu. etc. R. R. Co.* 4 Ohio St. 308.

5 *Nicoll v. New York etc. Railway Co.* 12 N. Y. 121, 123; *Dupee v. Boston Water Power Co.* 114 Mass. 37; *Heath v. Barmore*, 50 N. Y. 303; *Nelson v. Fleming*, 56 Ind. 310.

6 *People v. Mich. etc. R. R. Co.* 3 Mich. 496; *De Varaigne v. Fox*, 2 Blatchf. 95; *Rexford v. Knight*, 11 N. Y. 308.

7 *Heath v. Barmore*, 50 N. Y. 302; and see *Troy etc. R. R. Co. v. Potter*, 42 Vt. 265; *Conn. etc. R. R. Co. v. Holton*, 32 Id. 47; *Hazen v. Boston etc. R. R. Co.* 2 Gray, 574, 580.

8 *Park Comm'rs v. Armstrong*, 45 N. Y. 234.

9 *Wash. Cemetery v. Prospect Park etc. R. R. Co.* 68 N. Y. 591; *Sharp v. Speir*, 4 Hill, 76.

10 *Dingley v. Boston*, 100 Mass. 544; *Heyward v. Mayor etc.* 7 N. Y. 314; *Nordieet v. Cromwell*, 70 No. Car. 634.

§ 96. **Owner entitled to compensation.**—The authority to take private property for public use, under the right of eminent domain, can only be exercised on making full compensation to the owner for the land or other property taken.¹ But in respect to compensation, there is a distinction between a taking by a public municipal corporation, as a state, county, or town, and by an individual or private corporation.² In the former case it is sufficient if an adequate remedy is provided, which the party may resort to on his own motion to recover compensation;³ but in the latter case it is not enough that a provision is made by law for ascertaining and making compensation after the taking without also providing an adequate and certain fund, from which the party may, at some future time, be compensated.⁴ In respect to its real estate, a private corporation is entitled to the same constitutional protection that an individual would be, and the property of neither can be taken for public use by authority of the legislature unless compensation be made therefor.⁵ The right to use the water of a stream is property, and a charter provision giving the corporation power to take such water for manufacturing purposes, without compensation to others using it for similar purposes, is unconstitutional.⁶ But compensation is only necessary when private property is to be taken;⁷ and since there is no private property in the waters of navigable rivers, or in the shore between high and low water mark,⁸ the legislature may authorize the land below high-water mark to be taken for a public use, without compensation to the riparian owner.⁹ And generally, when the

State authorizes a corporation or an individual to construct roads or bridges upon its own property, the right to proceed without compensation is implied.¹⁰ But the legislature may not authorize a corporation or an individual to cut off a spring of water below high-water mark on a navigable river without compensation to the riparian owner for the injury thereby sustained.¹¹ Nor can wild or unimproved lands be taken for public use, by right of eminent domain, unless compensation be made to the owners.¹² And an act of congress providing that telegraph companies may construct their lines over post-roads, does not authorize them to construct their lines over the right of way of railroad companies without making compensation therefor.¹³ The proceedings to ascertain the compensation to be made to the owner of property taken for public use are usually, if not universally, prescribed by statute, and the mode pointed out is exclusive of any other.¹⁴ And the provisions of the statute in reference to compensation must be strictly complied with, or no title can vest under the provisions authorizing the taking of the property.¹⁵ But the right to compensation may be waived;¹⁶ and a failure to claim damages for lands taken, within a reasonable time limited by law for that purpose, operates as a waiver, to the extent, at least, that the title to the lands vests without the payment of damages;¹⁷ but merely permitting a corporation to enter upon land and to commence the erection of works, without objection, is not a waiver of the right of compensation for the land taken.¹⁸ If, however, the works are completed, or large expenditures have been made thereon, upon the faith of such apparent acquiescence, the owner cannot reclaim the land, or enjoin its use by the corporation.¹⁹ A squatter, or one who is merely in the possession of land without title or interest, is not entitled to compensation on the taking of the land for public use.²⁰ A corporation or public body empowered by law to require the owner of land to sell or surrender it at an appraised value may be

permitted to discontinue proceedings instituted by them to acquire title at any time before the title is acquired, and the rights resulting therefrom have become vested in the property-holder.²¹ But where the proceedings are abandoned because the price assessed is unsatisfactory, the corporation instituting such proceedings, must answer to the owner for all damages occasioned by them.²²

1 See *Withers v. Duckley*, 20 How. 84; *Reitenbaugh v. Chester Valley Railw. Co.* 21 Pa. St. 100; *Craig v. Rochester etc. R. R. Co.* 39 Barb. 424; *Colton v. Rossi*, 9 Cal. 55; *Galloway v. Mayor etc. Law R.* 1 H. L. 34; *Reg. v. Eastern Counties Railw.* 2 Q. B. 347; *Bigg v. Corp. of London*. Law R. 15 Eq. 375.

2 *Lowereo v. Newark*, 38 N. J. L. 151.

3 *Lafayette v. Bush*, 19 Ind. 326; *Curran v. Shattuck*, 24 Cal. 427; *McCann v. County*, 7 id. 121; *Comm'rs etc. v. Bowle*, 34 Ala. 461; *Rexford v. Knight*, 11 N. Y. 303; *Ash v. Cummings*, 50 N. H. 501. Compare *Keene v. Bristol*, 28 Pa. St. 46; *Cameron v. Supervisors etc.* 47 Miss. 264.

4 *White v. Nashville etc. R. R. Co.* 7 Helsk. 518; *Avery v. Fox*, 1 Abb. U. S. 246; *Ash v. Cummings*, 50 N. H. 501; *Bohman v. Green Bay etc. R. R. Co.* 30 Wis. 105. Compare *Chapman v. Gates*, 54 N. Y. 132; *Johnson v. Joliet etc. R. R. Co.* 23 Ill. 202.

5 *Miller v. N. Y. etc. R. R. Co.* 21 Barb. 513; *White River Turnp. Co. v. Vt. Cent. R. R. Co.* 21 Vt. 590. See *Albany etc. R. R. Co. v. Brownell*, 24 N. Y. 345.

6 *Harding v. Stamford Water Co.* 41 Conn. 87; and see *Barclay etc. Co. v. Ingham*, 35 Pa. St. 134; *Gardner v. Trustees etc.* 2 Johns. Ch. 163; *Trenton Water Power Co. v. Raff*, 38 N. J. L. 335; *Bush v. Trowbridge Water Works Co.* Law R. 19 Eq. 291.

7 See *Young v. Harrison*, 6 Ga. 130; *Bennett v. Boyle*, 40 Barb. 551; *Richards v. Scarborough Public Market Co.* 23 Eng. L. & Eq. 343.

8 *Trustees of Brookhaven v. Strong*, 60 N. Y. 56; *Martin v. Waddell*, 16 Peters, 367; *Teschmacher v. Thompson*, 18 Cal. 21.

9 *Gould v. Hudson River R. R. Co.* 6 N. Y. 522.

10 *Penn'a R. R. Co. v. New York etc. R. R. Co.* 23 N. J. Eq. 157; see also, *Reg. v. Hull Dock Co.* 11 Jur. 15; 3 Eng. Railw. Cas. 795; *Susquehanna Canal Co. v. Wright*, 9 Watts & S. 9; *Sugar Refining Co. v. Mayor etc.* 28 N. J. Eq. 247; *Abraham v. Great North. Railw. Co.* 16 Q. B. 506.

11 *Lehigh Valley R. R. Co. v. Trone*, 28 Pa. St. 206.

12 *Wallace v. Karlenowefski*, 19 Barb. 118.

13 *Southwestern R. R. Co. v. Telegraph Co.* 46 Ga. 44; *Atlantic Tel. Co. v. Chicago R. R. Co.* 6 Biss. 158.

14 *Sower v. Philadelphia*, 35 Pa. St. 231; *Eldemiller v. Wyandotte City*, 2 Dill. 376; *People v. Jefferson County Court*, 53 Barb. 136; *Garrison v. New York*, 21 Wall. 186; *Cushman v. Smith*, 34 Me. 247; *Hovey v. Mayo*, 43 id. 322; *Flagg v. Worcester*, 13 Gray, 601; *Reock v. Newark*, 33 N. J. L. 129.

15 *Stacey v. Vt. Cent. R. R. Co.* 27 Vt. 39; *Preble v. Portland*, 45 Me. 241; *Trumpler v. Bernerly*, 39 Cal. 40; *Duffield v. Detroit*, 15 Mich. 474; *Welker v. Potter*, 18 Ohio St. 85; *Nichols v. City of Bridgeport*, 23 Conn. 189; *Benett v. City of Buffalo*, 17 N. Y. 333; *Dennis v. Hughes*, 8 Up. Can. Q. B. 444.

- 16 See *Kent v. Wallingford*, 42 Vt. 651.
- 17 *Nelson v. Fleming*, 56 Ind. 310.
- 18 *Evansville etc. R. R. Co. v. Grady*, 6 Bush, 144.
- 19 *Goodwin v. Cin. etc. Canal Co.* 18 Ohio St. 169.
- 20 *Rosa v. Mo. etc. R. R. Co.* 18 Kra. 124; see *Ex parte Winder*, Law R. 6 Ch. Div. 696.
- 21 *Matter of Comm'rs*, 56 N. Y. 144; and see *State v. Hug*, 44 Mo. 116; *Duncan v. Louisville*, 8 Bush, 98; *Shaw v. Charlestown*, 3 Allen, 538; *Johnson v. Ahmeda*, 14 Cal. 106; *Rider v. Stryker*, 63 N. Y. 136; but compare *Walker v. Eastern Counties Railw.* 6 Hare, 534; *Rex v. Comm'rs etc.* 4 Barn. & Adol. 335; *Stone v. Commercial Railw. Co.* 4 Mylne & C. 122.
- 22 *Leisse v. St. Louis etc. R. R. Co.* 2 Mo. App. 105; and see *Hullen v. Municipality*, 11 Rob. (La.) 97; *State v. Graves*, 19 Md. 351; *Re Strathmore Estates*, Law R. 13 Eq. 338.

§ 97. What acts, etc., constitute a "taking."—The constitutional prohibition against taking private property for public uses, without just compensation, precludes the acquisition of any title, easement, or permanent appropriation of the land, from the owner, without an actual payment or tender of a just compensation;¹ but a survey and other preliminary steps to the acquisition of a title, are not a "taking" within the meaning of the constitution.² So, where a corporation, in constructing its works, injuriously affects adjoining land, this is not a "taking" of it for public use, within the purview of the constitution.³ But a serious interruption to the common and necessary use of property may amount to a "taking";⁴ as, where lands are actually invaded by additions of water, earth, sand, or other materials,⁵ or by having any artificial structure placed on them, so as effectually to destroy or impair their usefulness.⁶

1 *Nichols v. Somerset etc. R. R. Co.* 43 Me. 356; *Eaton v. Railroad Co.* 51 N. H. 504. Compare *Eagle v. Charing Cross Railw. Co.* Law R. 2 Com. P. 638; *Railroad Co. v. Richmond*, 56 U. S. 521.

2 *Stewart v. City of Baltimore*, 7 Md. 500; *Polly v. Saratoga etc. R. R. Co.* 9 Barb. 449; *Standish v. Mayor etc.* 1 Drew. 1; 15 Eng. L. & Eq. 255.

3 *Radcliff v. Mayor etc.* 4 N. Y. 195; *Sabin v. Vt. Cent. R. R. Co.* 25 Vt. 363; *Callender v. Marsh*, 1 Pick. 418; *Matter of Hamilton Avenue*, 14 Barb. 403; *Bradley v. New York etc. R. R. Co.* 21 Conn. 294; *Transportation Co. v. Chicago*, 99 U. S. 635.

4 *Cushman v. Smith*, 34 Me. 247; *Pumpelly v. Green Bay Co.* 13 Wall. 166.

5 *Eaton v. Railroad Co.* 51 N. H. 504; *Arlmond v. Green Bay Co.* 21 Wis. 316.

6 *Pumpelly v. Green Bay Co.* 13 Wall. 166.

CHAPTER IX.

ULTRA VIRES.

- § 98. Nature of the doctrine of, in general.
- § 99. Application of the doctrine to contracts, generally.
- § 100. Contracts in violation of statute, or public policy.
- § 101. Relation of the doctrine to executed contracts.
- § 102. Instances of the application of the doctrine.
- § 103. Instances of transactions not *ultra vires*.
- § 104. Effect of estoppel, or ratification, on transactions *ultra vires*.

§ 98. Nature of the doctrine of, in general.—The expression, "*ultra vires*," is "the modern technical designation, in the law of corporations, of acts beyond the scope of their powers, as defined by their charters or acts of incorporation."¹ The expression also applies to the act of a corporation in exercising its corporate powers in a mode different from that prescribed by the terms of the grant.² It is a concise and convenient form by which to indicate the unauthorized action of artificial persons with limited powers.³ The acts of a corporation may be *ultra vires*, and yet, not illegal;⁴ and generally, when acts of corporations are spoken of as *ultra vires*, it is not intended that they are unlawful, or even such as the corporation cannot perform, but merely those which are not within the powers conferred upon the corporation by the act of its creation.⁵ The term is, however, used in different senses, and this should be kept in mind, when a question arising out of dealings with a corporation is under consideration.⁶ Thus, a corporate act is said to be *ultra vires*, first, when it is not within the scope of the powers of the corporation to perform it under any circumstances, or for any purpose; or, second, with reference to the rights of certain parties, when the corporation is not authorized

to perform it without their consent; or, third, with reference to some specific purpose, when it is not authorized to perform it for that purpose, although fully within the scope of the general powers of the corporation, with the consent of the parties interested, or for some other purpose.⁷ In general, if a corporate act can be shown to be *ultra vires* in the sense first mentioned, the plea of *ultra vires* is available, even to the corporation itself, without regard to the circumstances under which the alleged performance took place;⁸ but when it is objected that the act is *ultra vires* in the second or third sense, special facts may exist which meet and overthrow the defense.⁹ The doctrine of *ultra vires* is of modern growth, and is the creature purely of judicial decision.¹⁰ In England, the doctrine has been carried farther than the courts in this country have been disposed to extend it;¹¹ and the latter courts now favor a far more liberal rule in regard to transactions *ultra vires* than formerly.¹²

1 2 Rouv. Dict. 620; and see *Grigg v. Foote*, 4 Allen, 195; *Bissell v. Mich. etc. R. R. Co.* 22 N. Y. 258; *East Anglian Railw. Co. v. Eastern Counties Railw. Co.* 11 Com. B. 775; 5 Am. Law Rev. 272.

2 *McSpedon v. Mayor etc.* 20 How. Pr. 396; 7 Bosw. 601; *Matthews v. Skinker*, 62 Mo. 329.

3 *Nat. Pemberton Bank v. Porter*, 125 Mass. 333.

4 *Bissell v. Mich. etc. R. R. Co.* 22 N. Y. 258; and see *Riche v. Ashbury Railw. etc. Co.* Law R. 7 H. L. 653.

5 *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 68; and compare *Taylor v. Chichester etc. Railw. Co.* Law R. 2 Ex. 356.

6 See *Bissell v. Mich. etc. R. R. Co.* 22 N. Y. 258; *Farmers' Bank v. Detroit etc. R. R. Co.* 17 Wis. 372; *Vandall v. South Dock Co.* 40 Cal. 83.

7 *McPherson v. Foster*, 43 Iowa, 48; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543.

8 *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543.

9 *Monument Nat. Bank v. Globe Works*, 101 Mass. 57; 3 Am. R. 322; *Toledo etc. R. R. Co. v. Rodrigues*, 47 Ill. 188; *Minor v. N. Y. etc. R. R. Co.* 63 N. Y. 363; *State Board v. Citizens' Street Railw. Co.* 47 Ind. 407; *Southern Life Ins. Co. v. Lanier*, 5 Fla. 110; *Bank of So. Car. v. Hammond*, 1 Rich. 281.

10 See *Green's Brice's Ultra Vires*, (2nd ed.) vii, ix; *Commonw. v. Arrison*, 15 Serg. & R. 127; *Binney's Case*, 2 Bland. 99; *Pearce v. Madison etc. R. R. Co.* 21 How. 441; *Colman v. Eastern Counties Railw. Co.* 10 Beav. 1; *East Anglian Railw. Co. v. Eastern Counties Railw. Co.* 11 Com. B. 775.

11 See *Crampton v. Varna Railw. Co.* Law R. 7 Ch. 562; *Shrewsbury etc. Railw. Co. v. N. W. Railw. Co.* 6 H. L. Cas. 113; *Riche v. Ashbury Railw. etc. Co.* Law R. 7 H. L. 653.

¹² See *Railway Co. v. McCarthy*, 96 U. S. 258; *Hurd v. Green*, 17 Hun, 337; *State Board v. Citizens' Street R. R. Co.* 47 Ind. 407; *Oil Creek etc. R. R. Co. v. Penn'a Transp. Co.* 83 Pa. St. 166.

§ 99. Application of the doctrine to contracts generally.—As a general rule, a contract entered into by a corporation, which is entirely foreign to the objects and purposes of its creation, is void, for want of power over the subject.¹ Such contract, though under the corporate seal, regularly affixed, does not bind the corporation, if it clearly appear that the legislature meant that such a contract should not be made;² but the rule is otherwise where the corporation contracts with reference to a subject within its powers, although in so doing it exceeds those powers.³ A corporation which exceeds its powers in loaning money for two years instead of one, and upon note and mortgage instead of bond and mortgage, may, nevertheless, maintain an action upon the securities.⁴ So, if a corporation, in excess of its powers, receives money on the condition that it is to be returned unless a certain additional amount is received by it within a certain time, and the condition is broken, an action will lie to recover the money.⁵ Where a corporation buys more land than the law allows, this is a wrong which can only be inquired into by the state, and the corporation does not thereby lose its rights as against trespassers.⁶ Bonds of a railroad company are not rendered void in consequence of being secured by a mortgage which the company may have had no authority to execute.⁷ The violation of its charter by an incorporated bank, in circulating as currency notes or bills not payable on demand, does not invalidate a contract made by the bank with other parties, in which the circulation of such notes or bills is involved.⁸ And though a bank violate its charter by taking more than a certain interest, a note securing higher interest is not void as being a contract which the bank had no authority to make.⁹ But owning and navigating steamships, being a distinct business from docking and repairing such vessels, a corporation formed solely for

the latter business cannot lawfully engage in the former; and a subscription by such a corporation to the stock of a corporation engaged solely in the former business, is not enforceable.¹⁰ So, a company incorporated for the purpose of establishing and conducting a line of vessels for the conveyance of passengers between certain places, cannot make a valid contract for the breaking of ice, and the towing of vessels through the track broken, to another place.¹¹ Nor can a corporation, authorized by its charter to boom lumber and receive toll therefor, recover toll for driving lumber.¹² So, where two railroad companies, without authority, assumed to consolidate into one, and bought a steamboat to run in connection with their road, notes given for the purchase were declared void, and the holder was not permitted to recover on them against the corporations.¹³ And, as a general rule, parties contracting with corporations are chargeable with notice of their powers, and the limitations upon them, and cannot plead ignorance in avoidance of the defense of *ultra vires*.¹⁴

1 *Beach v. Fulton Bank*, 3 Wend. 573; *Rock River Bank v. Sherwood*, 10 Wis. 230; *Weckler v. First Nat. Bank*, 43 Md. 581; *Smith v. Buffalo*, 1 Sheld. 493; 19 Alb. L. J. 397; *Brooklyn Gravel Road Co. v. Slaughter*, 33 Ind. 185; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543; *Hattersley v. Earl of Shelburne*, 31 Law J. Ch. 875.

2 *Bateman v. Mayor etc.* 3 Hurl. & N. 323; *Mayor etc. v. Norfolk Railw. Co.* 4 El. & B. 397; *South Yorkshire Railw. etc. Co. v. Great North. Railw. Co.* 9 Ex. 55, 84.

3 *Littlewort v. Davis*, 50 Miss. 403; *Haynes v. Covington*, 13 Smedes & M. 408; *Monument Nat. Bank v. Globe Works*, 101 Mass. 57; *Proprietors of City Hotel v. Dickinson*, 6 Gray, 588; *City Fire Ins. Co. v. Carrugi*, 41 Ga. 660; *Kligore v. Bulkley*, 14 Conn. 362; *State Board v. Citizens' R. R. Co.* 47 Ind. 407; *Agar v. Athenaeum Assoc. Soc.* 3 Conn. B. N. S. 725; *Royal British Bank v. Turquand*, 5 El. & B. 248.

4 *Germantown etc. Ins. Co. v. Dhein*, 43 Wis. 420; 28 Amb. 549; *Compare Herzo v. San Francisco*, 33 Cal. 134; *Life Ins. Co. v. Mechanic Fire Ins. Co.* 7 Wend. 31.

5 *Morville v. Am. Tract Soc.* 123 Mass. 129; 25 Am. R. 40.

6 *Whitman Min. Co. v. Baker*, 3 Nev. 388; and see *South. Life Ins. Co. v. Lawler*, 5 Fla. 110; *Bank of So. Car. v. Hammond*, 1 Rich. 281.

7 *Phila. etc. R. R. Co. v. Lewis*, 33 Pa. St. 33.

8 *Cannon v. McNab*, 48 Ala. 99.

9 *Rock River Bank v. Sherwood*, 10 Wis. 230; and see *Fleckner v. U. S. Bank*, 8 Wheat. 338. But compare *Bank of U. S. v. Waggener*, 9 Peters, 399; *Farmers' etc. Bank v. Harrison*, 57 Mo. 503; *Farmers' Bank v. Burchard*, 33 Vt. 246.

10 *New Orleans etc. Steamship Co. v. Ocean Dry Dock Co.* 28 La. An. 173; 26 Am. R. 90.

11 *Penna. etc. Nav. Co. v. Dandridge*, 8 Gill & J. 248; *Abbott v. Balt. etc. Packet Co.* 1 Md. Ch. 542; and see *Waldo v. Chicago etc. R. R. Co.* 14 Wis. 675; *Brown v. Winnisimmet Co.* 11 Allen, 328; *Vaudall v. Dock Co.* 40 Cal. 83; *South Wales Railw. Co. v. Redmond*, 10 Com. B. N. S. 674.

12 *Bangor Broom Corp. v. Whiting*, 29 Me. 123.

13 *Pearce v. Madison etc. R. R. Co.* 21 How. 441.

14 *Brady v. Mayor etc.* 20 N. Y. 312; *Taft v. Pittsford*, 28 Vt. 286; *Franklin Co. v. Lewiston Institution etc.* 68 Me. 43; 28 Am. R. 9; *Root v. Goddard*, 3 McLean, 162; *Ex parte Williamson*, Law R. 5 Ch. 303.

§ 100. *Contracts in violation of statute, or public policy.*—Corporations, like individuals, are subject to legislative action;¹ and contracts made by them, the making of which is expressly prohibited by statute, are so far void that actions cannot be maintained on them,² although the statute does not in terms declare that such contracts shall be void, but merely prescribes a penalty for making them.³ A note made by a corporation in violation of a law forbidding corporations to make notes of a certain description is void,⁴ even in the hands of a *bona fide* holder;⁵ and a guarantee of such a note is likewise void.⁶ But the making of a single loan in good faith is not a violation of an act prohibiting the keeping of an office of discount and deposit for the transaction of business.⁷ And a single contract made by a corporation for the purchase of goods is not a violation of a statutory provision that "no corporation shall engage in mercantile or agricultural business, nor in commission, brokerage, stock-jobbing, exchange, or banking business of any kind."⁸ When the statutory restrictions upon the exercise of corporate powers is in respect only to the extent or quantity allowable, the transaction may be sustained up to the limit, and held void as to the excess.⁹ Contracts in violation of public policy, whether made by corporations or by individuals, are void, and will not be enforced by the courts.¹⁰ Thus, any agreement to influence the action of the directors of a corporation, for the benefit of others, and to the prejudice of the company, is

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void as against public policy;¹¹ so, of a contract of a corporation tending to prevent the extension of a rival corporation's charter;¹² and so of an agreement between a corporation and state inspectors, that the former may retain a portion of the fees chargeable for inspection, in consideration of its forbearing to make efforts to procure a repeal of the inspection law.¹³

1 Blair v. Perpetual Ins. Co. 10 Mo. 561; State v. Mathews, 44 Id. 523; Paine v. Baldwin, 3 Smedes & M. 661; People v. State Ins. Co. 19 Mich. 392. Compare Richmond Bank v. Robinson, 42 Me. 589.

2 Smith v. Morse, 2 Cal. 524; Hayden v. Davis, 3 McLean, 276; Utica Ins. Co. v. Scott, 19 Johns. 1; Hill v. Mitchell, 25 Ga. 704; Morris etc. R. Co. v. Sussex R. R. Co. 20 N. J. Eq. 542; State v. Krebs, 64 No. Car. 604; and see Chambers v. Manchester etc. Railw. Co. 5 Best & Smith, 565; South Wales Railw. Co. v. Bedmond, 10 Com. B. N. S. 675.

3 Cincinnati etc. Ins. Co. v. Rosenthal, 55 Ill. 85; Leavitt v. Palmer 3 N. Y. 19.

4 Davis v. Bank of River Raisin, 4 McLean, 387; Root v. Wallace, 4 Id. 8. Compare Lawler v. Walker, 18 Ohio, 151; McGhee v. Powell, 8 Ala. 87; N. Y. etc. Trust Co. v. Helmer, 77 N. Y. 64.

5 Root v. Goddard, 3 McLean, 102; Halstead v. Mayor etc. 5 Barb. 218. Compare Monument Nat. Bank v. Globe Works, 101 Mass. 57.

6 Swift v. Beers, 3 Denio, 70; and see Tylee v. Yates, 3 Barb. 222.

7 Suydam v. Morris Canal etc. Co. 6 Hill, 217; and see Potter v. Bank of Ithaca, 7 Id. 530.

8 Graham v. Hendricks, 22 La. An. 323; and see Steam Nav. Co. v. Weed, 17 Barb. 378.

9 Farmers' etc. Bank v. Harrison, 57 Mo. 503. Compare Ossipee etc. Manuf. Co. v. Canney, 54 N. H. 235.

10 Agricultural Bank v. Robinson, 24 Me. 274; Marshall v. Balt. etc. R. R. Co. 16 How. 314; Ohio Life Ins. etc. Co. v. Merchants' etc. Trust Co. 11 Humph. 1.

11 Davison v. Seymour, 1 Bosw. 88; Bliss v. Matteson, 52 Barb. 335; S. C. 45 N. Y. 22.

12 State v. Hartford etc. R. R. Co. 29 Conn. 538.

13 Reed v. Tobacco Warehouse Co. 2 Mo. App. 82. Compare Edge-ware Highway Board v. Harrow etc. Gas Co. Law R. 10 Q. B. 92.

§ 101. Relation of the doctrine to executed contracts.—When a contract, strictly *ultra vires*, is merely executory, a corporation cannot be held bound by it.¹ But where contracts, made by or with corporations, are not tainted by fraud, or expressly prohibited by statute, and have been fully or even partially executed, so that it would be unjust to allow a repudiation thereof by either party, the defense of *ultra vires* will not be sustained by the courts.² The defense should not as a general rule pre-

vail, whether interposed for or against a corporation, when it would not advance justice, but on the contrary work a legal wrong.³ Therefore, if a corporation has entered into a contract, which has been fully executed on the other part, and nothing remains but the payment by the corporation of the consideration, it will not be allowed to set up that the contract was *ultra vires*; ⁴ and one who has received from a corporation the full consideration of his engagement to pay money, either in services or property, cannot avail himself of the objection that the contract thus fully performed by the corporation was *ultra vires*, or not within its chartered privileges and powers.⁵ If work is done, or goods are furnished, to enable a corporation to carry into effect the purposes of its creation, and such services or such goods are accepted by the corporation, and the whole consideration is executed, payment cannot be refused by the corporation upon the ground that the contract was not under seal.⁶ Nor can a corporation recover back money, paid by the directors, from one who, at the request of the directors, has furnished goods to the corporation, although the purchase may have been wholly *ultra vires*.⁷ Where a corporation has accepted the benefit of a loan, it cannot avoid liability upon a mortgage given to secure its payment, by repudiating the authority of those who contracted the loan.⁸ And the doctrine of *ultra vires* cannot be carried to the extent of requiring one who honestly lends money to a corporation for proper purposes, to see that the money is not applied to other purposes.⁹ Contracts openly made by the officers of a corporation, and within the knowledge of the corporators, who have acquiesced in and received the value of them, are binding upon the corporation, although not expressly authorized in its charter.¹⁰ On the other hand, in actions by corporations upon contracts, when it is a simple question of capacity or authority to contract, arising either on a question of regularity of organization, or of powers conferred by the charter, a party

who has had the benefit of the contract cannot be permitted to question its validity.¹¹ In an action by a corporation upon an executed contract, under which the defendant has received the whole benefit of the consideration, it is no answer that the corporation itself was not originally bound by the contract, because of its not having been made under their common seal.¹² So, a contract by a corporation for the sale of property previously bought, may be enforced against the purchaser, although the corporation was not empowered to purchase and hold the property.¹³ And one who has received property from a corporation by way of mortgage, and who has sold it under the mortgage, cannot excuse himself from crediting the proceeds to the corporation, on the ground that the purchase of the property by the corporation was *ultra vires*.¹⁴ And where a person enters and occupies the premises of a corporation, though without a demise under seal, he will be liable in an action for use and occupation.¹⁵

1 Gas Co. v. San Francisco, 9 Cal. 453; Parish v. Wheeler, 22 N. Y. 494, 508; Thompson v. Lambert, 44 Iowa, 239; Bradley v. Ballard, 55 Ill. 417.

2 Bradley v. Ballard, 55 Ill. 417; Hurd v. Green, 17 Hun. 327; Herzo v. San Francisco, 23 Cal. 314; Miners' Ditch Co. v. Zellerbach, 37 Id. 543; Foulke v. San Diego etc. R. R. Co. 51 Id. 385; Hayes v. Gallion Gas Co. 29 Ohio St. 339; Bissell v. Mich. etc. R. R. Co. 23 N. Y. 258, 262; Attleborough Nat. Bank v. Rogers, 125 Mass. 339; Perkins v. Portland etc. R. R. Co. 47 Me. 573; City of Natchez v. Mallory, 54 Miss. 499; State Board v. Citizens' R. R. Co. 47 Ind. 407; Hitchcock v. Galveston, 98 U. S. 341. Compare Downing v. Mt. Wash. Road Co. 43 N. H. 230; Ossipee etc. Manuf. Co. v. Canney, 54 Id. 235; Converse v. Norwich etc. Turnp. Co. 33 Conn. 168; Boyce v. Trustees etc. 46 Md. 359; Brooklyn Life Ins. Co. v. Blaise, 25 Ala. 538; Ex parte Williamson, Law R. 5 Ch. 309; First Nat. Bank v. Pierson, 24 Minn. 41; Thomp. Nat. Bank Cases, 637.

3 Whitney Arms Co. v. Barlow, 63 N. Y. 62; Buffett v. Troy etc. R. R. Co. 40 Id. 168; Madison Av. Baptist Church v. Oliver St. Church, 73 Id. 83; Darst v. Gale, 83 Ill. 138; Gold Min. Co. v. Rocky Mt. Nat. Bank, 2 Colo. 256; 98 U. S. 640; Whitney v. First Nat. Bank, 50 Vt. 338; Railway Co. v. McCarthy, 98 U. S. 258; Nat. Bank v. Matthews, 58 Id. 621; Stewart v. Nat. Bank, 2 Abb. U. S. 424.

4 Grant v. Henry Clay Coal Co. 80 Pa. St. 208; Oil Creek etc. R. R. Co. v. Penn'a Transp. Co. 83 Id. 160; and see De Groff v. Am. Linen Thread Co. 24 Barb. 375; 21 N. Y. 124; State Board v. Citizens' R. R. Co. 47 Ind. 407.

5 Zoltman v. San Francisco, 20 Cal. 96; Whitney Arms Co. v. Barlow, 63 N. Y. 62; Hague v. City of Philadelphia, 43 Pa. St. 527. See also Newburg Petroleum Co. v. Weare, 27 Ohio St. 343.

6 Nicholson v. Bradfield Union, Law R. 1 Q. B. 620; Clark v. Cuckfield Union, 11 Eng. L. & Eq. 442; and see Levy v. Metrop. Cal. Co. 25 Id. 263; Hooker v. Eagle Bank, 30 N. Y. 83; Sanders v. Guardians etc. 8 Q. B. 810.

7 *Re London etc. Exchange Bank*, Law R. 9 Eq. 270.

8 *Ottawa Plank Road Co. v. Murray*, 15 Ill. 336; and see *State of Indiana v. Woram*, 6 Hill, 33; *Phila. etc. R. R. Co. v. Lewis*, 33 Pa. St. 33; *Scott v. Colburn*, 26 Beav. 276.

9 *Mills v. Gleason*, 11 Wis. 470; *Thompson v. Lambert*, 44 Iowa, 239; *Bradley v. Ballard*, 55 Ill. 413; *Bigelow v. Perth Amboy*, 1 Dutch. 297; *Eastern Counties Railw. Co. v. Hawkes*, 5 H. L. Cas. 331.

10 *Alleghany City v. McClurkan*, 14 Pa. St. 81; and see *Reers v. Phoenix Glass Co.* 14 Barb. 368; *Bank of Middlebury v. Rutland etc. R. R. Co.* 30 Vt. 159; *Zabriskie v. Cleveland etc. R. R. Co.* 23 How. 381.

11 *Steam Nav. Co. v. Weed*, 17 Barb. 378; *Chester Glass Co. v. Dewey*, 16 Mass. 91, 102; *City of Baltimore v. Reynolds*, 20 Md. 1. And see *Cooper v. Curtis*, 30 Me. 488.

12 *Fishmongers' Co. v. Robertson*, 5 Man. & G. 131; 6 Scott N. R. 55. Compare *Mayor etc. v. Hardwick*, Law R. 9 Ex. 13; *Smith v. Neale*, 2 Com. B. N. S. 67.

13 *Rutland etc. R. R. Co. v. Proctor*, 29 Vt. 93; and see *Kelly v. People's Transp. Co.* 3 Oreg. 189; *Smith v. Sheeley*, 12 Wall. 358; *Cole Silver Min. Co. v. Virginia etc. Water Co.* 1 Sawy. 470. Compare *Leominster Canal Nav. Co. v. Shrewsbury etc. Railw. Co.* 3 Kay & J. 654.

14 *Parish v. Wheeler*, 22 N. Y. 494.

15 *Mayor etc. v. Till*, 4 Bing. 75; *Southwark Bridge Co. v. Sills*, 2 Car. & P. 371; and see *Lowe v. London etc. Railw. Co.* 14 Eng. L. & Eq. 18; 7 Eng. Railw. Cas. 524.

§ 102. Instances of the application of the doctrine.—In general, if it can be shown with respect to a corporate act that the corporation had not power, under any circumstances, to perform it, the defense of *ultra vires* is available, even to the corporation itself.¹ Acts of a corporation in the exercise of its powers in an unreasonable manner,² or in violation of the mode of exercise prescribed by the terms of the grant, are *ultra vires*.³ By-laws or regulations of a corporation which are contrary to its charter,⁴ or to the general principles of the common law,⁵ or to the policy of the state, are *ultra vires*, and void.⁶ So, of by-laws, rules, or resolutions enacted by a corporation for its government outside of the state where it has a corporate existence.⁷ Without clear legislative authority so to do, it is *ultra vires* of a corporation to mortgage its franchises.⁸ So, under a power to acquire lands for the corporate purposes, by right of eminent domain, it is *ultra vires* to acquire land for purposes of speculation.⁹ And the taking of more than lawful interest by a corporation, under a power to lend money, al-

though without limitation as to the rate of interest, is *ultra vires*.¹⁰ A general act authorizing incorporations for "hunting, fishing, or lawful sporting purposes," confers no authority to institute actions to recover penalties for violations of the game laws.¹¹ A statute authorizing a water company "to do all other things which shall be suitable or necessary for completing the works," does not confer authority to condemn one's right to the flow of a brook over his close, without including and taking the bed of the stream.¹² Establishing a horse-fair, to test the speed of horses, and to award premiums for such as excel, out of a fund raised by assessment on the owners of horses entered, and by admission fees to the fair ground, is *ultra vires* and illegal on the part of an agricultural society.¹³ The propagation and maintenance of trades union, and the support of members on a strike, are *ultra vires* of an English benevolent society.¹⁴ So, it is *ultra vires* of English benefit building societies to act or hold themselves out as freehold land societies;¹⁵ and rules authorizing a benefit building society to borrow money to an unlimited amount are *ultra vires*;¹⁶ and authority to borrow from members does not authorize the society to borrow from others.¹⁷ In Ohio, it is *ultra vires* of a building society to charge interest on the premiums allowed for precedence in taking loans.¹⁸ A manufacturing company has no authority under its general powers to indorse negotiable paper for accommodation.¹⁹ And a scheme on the part of such a company, to use the funds of the corporation for the purchase of the worthless notes of a competitor, for the purpose of embarrassing his business and injuring his credit, is wholly *ultra vires*.²⁰ In England, it is *ultra vires* for an ordinary railway company to draw, accept, or indorse bills of exchange;²¹ but it is otherwise in this country.²² Authority given to a railroad company to construct its road "along" a river, does not authorize its construction "in" or "upon" such river;²³ nor should a railroad company, under an author-

ity to change or occupy part of a public road, be permitted to exercise such authority with a view merely to its own convenience or pecuniary advantage.²⁴ Power to mortgage its "property" for loans does not authorize a mining company to mortgage its chattels;²⁵ and authority to receive lands as money, in payment of subscriptions to its capital stock, does not authorize the company to receive mere leasehold interests.²⁶ In an action on a premium note, or on a policy of insurance, it is a good defense that the contract was made in a state other than that of incorporation, and that the company had failed to comply with the laws of the former state respecting foreign corporations.²⁷ And where an insurance company, being insolvent, distributes its capital among its stockholders, such act is *ultra vires*, and a fraud upon creditors, and the dividends may be recovered back from the stockholders.²⁸ In respect to the affairs of a charitable corporation, any going beyond or departure from the object of the charity not permitted by the legislature,²⁹ compelled by necessity,³⁰ or excused by lapse of time and custom,³¹ will be *ultra vires*.³²

1 *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543; *Millnor v. N. Y. etc. R. R. Co.* 53 N. Y. 363; *Monument Nat. Bank v. Globe Works*, 101 Mass. 57; 3 Am. R. 322. *Ultra vires* no defense for a wrong committed by a corporation: *Nat. Bank v. Graham*, 100 U. S. 699. See also *Pattison v. Nat. Bank*, 60 N. Y. 82.

2 *St. Louis v. Webber*, 44 Mo. 547; *Bliscoe v. Great Eastern Railw. Co.* Law R. 16 Eq. 636; *Robinson v. Chartered Bank*, 1 id. 32.

3 *Matthews v. Skinker*, 62 Mo. 329; *Farmers' etc. Bank v. Harrison*, 57 id. 503; *Smith v. Eureka Flour Mills Co.* 6 Cal. 1; *Conro v. Port Henry Iron Co.* 13 Barb. 27.

4 *Rex v. Cutbush*, 4 Burr. 2204; *Kearney v. Andrews*, 2 Stockt. Ch. 70; *State v. Curtis*, 9 Nev. 325; *Cartau v. Father Matthew etc. Soc.* 3 Daly, 20.

5 *Philips v. Wickham*, 1 Palge, 590; *Kennebec etc. R. R. Co.* 31 Me. 470; *State v. Williams*, 75 No. Car. 134.

6 *Butchers' Ben. Assoc.* 35 Pa. St. 151; *Pulford v. Fire Department*, 31 Mich. 458; *State v. Merchants' Exchange*, 2 Mo. App. 96; and see *Driscoll v. West etc. Manuf. Co.* 59 N. Y. 96; *Smith v. City of Albany*, 61 id. 444.

7 *Müller v. Ewer*, 27 Me. 509; *Mitchell v. Vt. Copper Min. Co.* 8 Jones & S. 406; 67 N. Y. 280.

8 *Commonw. v. Smith*, 10 Allen, 448; *Pullan v. Cincinnati etc. R. R. Co.* 4 Blas. 35. Compare *Covington v. Covington etc. Bridge Co.* 10 Bush, 69.

- 9 *Pacific R. R. Co. v. Seely*, 45 Mo. 212. See also *Galloway v. Mayor etc.* Law R. 1 H. L. 34; *Iron R. R. Co. v. Ironton*, 19 Ohio St. 299; N. Y. etc. R. R. Co. v. Kip, 46 N. Y. 546.
- 10 *Simonton v. Lanier*, 71 No. Car. 498; *Johnson v. Griffin Bank Co.* 55 Ga. 691; *Caldwell v. Commercial Warehouse Co.* 1 Hun. 718; 4 *Thomp. & C.* 179. Compare *Rock River Bank v. Sherwood*, 10 Wis. 230.
- 11 *Ancient City etc. Club v. Miller*, 7 Lans. 413.
- 12 *Watson v. Acquackanonck Water Co.* 38 N. J. L. 196; and see *Farnsworth v. Goodhue*, 48 Vt. 209.
- 13 *Bronson Agric. Assoc. v. Ramsdell*, 24 Mich. 441.
- 14 *Hornby v. Close*, Law R. 2 Q. B. 153; and see *Pare v. Clegg*, 29 Beav. 589; *Reg. v. Scott*, 8 Jur. 473.
- 15 *Grimes v. Harrison*, 26 Beav. 435.
- 16 *Re Victoria Permanent Benefit Soc.* Law R. 9 Eq. 605; *Laing v. Reed*, Law R. 5 Ch. 4; *Re Professional etc. Soc.* 6 id. 854.
- 17 *Re Victoria Permanent Benefit Soc.* Law R. 9 Eq. 605.
- 18 *Forest City etc. Build. Assoc. v. Gallagher*, 25 Ohio St. 208.
- 19 *Lafayette Savings Bank v. St. Louis Stoneware Co.* 2 Mo. App. 299.
- 20 *Colles v. Trow City Directory Co.* 11 Hun. 397.
- 21 *Bateman v. Mid-Wales Railw. Co.* Law R. 1 Com. P. 499.
- 22 *Smead v. Indianapolis etc. R. R. Co.* 11 Ind. 104; *Lucas v. Pitney*, 27 N. J. L. 221; *Olcott v. Tioga R. R. Co.* 40 Barb. 179; 27 N. Y. 546.
- 23 *Stevens v. Erie Railw. Co.* 51 N. J. Eq. 259.
- 24 *Greenwich v. Easton etc. R. R. Co.* 24 N. J. Eq. 217. See also *Biscoe v. Great Eastern Railw. Co.* Law R. 16 Eq. 636.
- 25 *Roberts' Appeal*, 60 Pa. St. 400.
- 26 *Baschor v. Dressel*, 37 Md. 503.
- 27 *Williams v. Cheney*, 8 Gray, 206; *Columbia Fire Ins. Co. v. Kinyon*, 37 N. J. L. 33; *Lamb v. Lamb*, 6 Biss. 420; *Hoffman v. Banks*, 41 Ind. 1. *Contra*, *Union etc. Life Ins. Co. v. McMillen*, 24 Ohio St. 67.
- 28 *Osgood v. Laytin*, 3 Abb. Ct. App. 418; 3 Keys, 521.
- 29 See *Re Reading Dispensary*, 10 Sim. 118.
- 30 *Re Ashton's Charity*, 27 Beav. 115.
- 31 *Att.-Gen. v. Gould*, 28 Beav. 485; *Att.-Gen. v. Hartley*, 2 Jacob & W. 353; *Att.-Gen. v. Old South Soc.* 13 Allen, 474.
- 32 See *Att.-Gen. v. Margaret*, 1 Vern. 55; *Gilman v. Hamilton*, 16 Ill. 225; *Stanley v. Colt*, 5 Wall. 119; *Nelson v. Cushing*, 2 Cush. 519; *Sherlock v. Winnetka*, 83 Ill. 530.

§ 103. Instances of transactions not ultra vires.

The grant of corporate franchises is not to be so strictly construed as to defeat the object of the grant;¹ and such powers as are strictly incidental and necessary to the object of the grant, are implied.² The rule is, that if the means employed are reasonably adapted to the ends for which the corporation was created, they come within its implied or incidental powers, though they may not be

specifically designated by the act of incorporation.³ Thus, in order to accomplish the objects of its creation, a corporation has implied power to borrow money,⁴ to make commercial notes,⁵ to make and issue bonds,⁶ to loan its surplus funds,⁷ to mortgage its lands to the extent of securing a proper debt;⁸ and, under a general power to borrow, mortgage debentures issued by a company in part discharge of existing debts are not *ultra vires*.⁹ A corporation created for the purpose of mining and transporting coal, with power to purchase property required for that purpose, may purchase and use a steamboat in its business.¹⁰ And since depots, car, and engine-houses, tanks, repairing-shops, houses for bridge and switch-tenders, coal and wood yards, are necessary appendages to the operations of a railroad and transportation company, its power to hold land for these purposes will be implied.¹¹ So, a corporation owning a large body of lands, and authorized by its charter to aid in "the clearing and settlement of the country," may build saw-mills and a hotel to accommodate those having business at the location of the company.¹² Where a corporation is established for operating a patented machine, it is not *ultra vires* for the company to purchase the patent;¹³ and, under a general power to purchase property, it is not *ultra vires* for a corporation to purchase and hold a patent, the ownership of which will appropriately enable the company to carry out the corporate objects.¹⁴ Nor is it *ultra vires* for a company newly formed "for the purpose of manufacturing and selling glass," to contract for the purchase of glass-ware, in order to keep up their stock and supply customers, while their works are undergoing repairs.¹⁵ A contract entered into by a canal company with the owners of land, by which, in consideration of a grant of land to the company for its purposes, the grantor, etc., should have water from the feeder of the canal at all times, absolutely to a certain extent, and conditionally to a certain further extent, is not *ultra vires*.¹⁶ And where a canal company

has the right to draw water from a public river for corporate purposes, an agreement by the company to discharge its waste water at a certain point is not *ultra vires*.¹⁷ A railroad or steamboat company, being a common carrier of passengers, may establish on its car or vessel an agency for the delivery of passengers' baggage, and may exclude all other persons from entering for the purpose of soliciting or receiving orders from passengers in competition with such agency.¹⁸ So, a corporation chartered with power to purchase and hold water-power created by the erection of dams, and to hold real estate, may, when its water privileges can no longer be profitably used, lawfully sell its lands—receive its own stock in payment therefor—and may agree to raise the grade of the lands free of expense to the purchaser.¹⁹ So, an association of workmen formed for the purpose of protecting its members against the "encroachments" of employers is not illegal, and may maintain an action for the recovery of money belonging to them, although in attempting to carry out the purpose of the association, members have been guilty of illegal acts.²⁰ And it is not *ultra vires* for a corporation, whose general purpose is declared to be the welfare of its members, including their relief in times of sickness and distress, to extend its benefits to the families of its members, and make provision for the widows of deceased members.²¹

1 *Vandall v. South San Francisco Dock Co.* 40 Cal. 83; *Binghamton Bridge*, 3 Wall. 51; *Florida etc. R. R. Co. v. Pensacola etc. R. R. Co.* 10 Fla. 145.

2 *Linton v. Sharpsburg Bridge*, 1 Grant Cas. 414; *Gaines v. Coates*, 51 Miss. 335; *Perrine v. Chesapeake etc. Canal Co.* 9 How. 172; *Wood Hydraulic Hose Min. Co. v. King*, 45 Ga. 34; *Taylor v. Chichester etc. Railw. Co.* Law R. 2 Ex. 356; Law R. 6 H. L. 628.

3 *Madison etc. Plank Road Co. v. Watertown etc. Plank Road Co.* 5 Wis. 173.

4 *Rockwell v. Elkhorn Bank*, 13 Wis. 653; *Moss v. Harpeth Academy*, 7 Heisk. 293; *Alabama etc. Ins. Co. v. Central etc. Assoc.* 54 Ala. 73; *Hackettstown v. Swackhamer*, 37 N. J. L. 191; *Clark v. Titcomb*, 42 Barb. 122; and compare *Bryon v. Metrop. Saloon etc. Co.* 3 De Gex & J. 123.

5 *Hascall v. Life Assoc.* 5 Hun. 151; *Oxford Iron Co. v. Spradley*, 46 Ala. 98; *Matter of Hercules etc. Assur. Assoc.* 6 Ben. 35; *Re Great*

West. Tel. Co. 5 Biss. 363; Buckley v. Briggs, 30 Mo. 452; and see Re Land Credit Co. Law R. 4 Ch. 460; Re General Estates Co. Law R. 3 Ch. 758.

6 Town of Queensbury v. Culver, 19 Wall. 83; Tucker v. Raleigh, 75 No. Car. 267; Thompson v. Lambert, 44 Iowa, 239. See Wilson v. Shreveport, 29 La. An. 673.

7 Western Boatmen's Assoc. v. Kribban, 48 Mo. 37. Compare Pickering v. Stephenson, Law R. 14 Eq. 322; Morton v. Smith, 5 Bush, 467.

8 Richards v. Merrimack etc. R. R. Co. 44 N. H. 127; Watts' Appeal, 78 Pa. St. 370; Trustees etc. v. Shulze, 61 Ind. 511; West v. Madison County Agr. Board, 82 Ill. 205; Commonw. v. Smith, 10 Allen, 448; Re Patent File Co. Law R. 6 Ch. 83.

9 Re Inns of Court Hotel Co. Law R. 6 Eq. 82.

10 Callaway etc. Co. v. Clark, 32 Mo. 305; and see Wheeler v. San Francisco etc. R. R. Co. 31 Cal. 46; Downing v. Mt. Wash. etc. Co. 40 N. H. 230.

11 State v. Comm'rs etc. 3 Zab. 510; and compare Holmes v. Eastern Counties Railw. Co. 3 Kay & J. 975; Flanagan v. Great West. Railw. Co. Law R. 7 Eq. 116.

12 Watts' Appeal, 78 Pa. St. 370.

13 Re British etc. Cork Co. Law R. 1 Eq. 231.

14 Dorsey etc. Bake Co. v. Marsh, 6 Fish. Pat. Cas. 387.

15 Lyndeborough Glass Co. v. Mass. Glass Co. 111 Mass. 315.

16 Hoppock v. United etc. R. R. Co. 27 N. J. Eq. 286.

17 Armstrong v. Penn'a R. R. Co. 38 N. J. L. 1.

18 Barney v. Oyster Bay etc. Steamboat Co. 67 N. Y. 301.

19 Dupee v. Boston Water-Power Co. 114 Mass. 37.

20 Snow v. Wheeler, 113 Mass. 179. Compare Willson v. Owen, 30 Mich. 474.

21 Gundlach v. Germania Mechanics' Assoc. 4 Hun, 339.

§ 104. Effect of estoppel or ratification on transactions *ultra vires*.—A corporation has the power to waive a right,¹ and may be bound by estoppel *in pais*.² Thus, a strict compliance with the conditions of a contract beneficial to the corporation may be waived;³ and where an act is within the scope of the corporate powers, the corporation may be estopped from objecting that the form adopted was not the exact mode prescribed in the charter.⁴ So, in an action against a corporation to recover money loaned to it, the corporation is estopped from setting up the defense that the money was borrowed and used for an *ultra vires* purpose, although the lender knew the purpose intended.⁵ But the doctrine of estoppel *in pais* is not carried to the extent as to enable a corpora-

tion to do in effect what the law forbids,⁶ or what it never could by legal possibility have done.⁷ A municipal corporation is not estopped from asserting the invalidity of its bonds by any contract of its officers or agents, nor by any acts of acquiescence and approval on the part of the inhabitants of the municipality after knowledge of the facts.⁸ So, where a lease made by a corporation is invalid, as being *ultra vires*, the acceptance of rent by the corporation under such lease will not render it valid.⁹ And transactions which are *ultra vires* in the strict sense¹⁰ are incapable of ratification;¹¹ but if a transaction be *ultra vires* in the more limited sense of the term,¹² it may be rendered binding by subsequent ratification.¹³ Acts, *ultra vires*, of a corporation which is a creature of the laws of two different states, cannot be ratified by a subsequent statute enacted by the legislature of one only of such states.¹⁴

1 See *Barton v. Plank Road Co.* 17 Barb. 397; *Hale v. Union etc. Ins. Co.* 32 N. H. 235.

2 *Erie Railw. Co. v. Delaware etc. R. R. Co.* 21 N. J. Eq. 283; *Newburg Petroleum Co. v. Weare*, 27 Ohio St. 343; *Simpson v. Windham etc. Ins. Co.* 57 N. H. 160; *Webb v. Comm'rs etc.* Law R. 5 Q. B. 642.

3 *New England Car Spring Co. v. Union India Rubber Co.* 4 Blatchf. 1.

4 *Hood v. N. Y. etc. R. R. Co.* 22 Conn. 1; *Boyce v. Trustees etc.* 46 Md. 359; *City Fire Ins. Co. v. Carrugi*, 41 Ga. 680; *Copper Miners' Co. v. Fox*, 16 Q. B. 229.

5 *Bradley v. Ballard*, 55 Ill. 413; and see *West v. Madison County Agr. Board*, 82 Id. 205.

6 *Re Comstock*, 3 Sawy. 218.

7 *Penna. etc. Steam Nav. Co. v. Dandridge*, 8 Gill & J. 248; *Marion Sav. Bank v. Dunkin*, 54 Ala. 471; *Hitchcock v. City of Galveston*, 96 U. S. 341.

8 *Weismer v. Village of Douglass*, 64 N. Y. 81; and see *McPherson v. Foster*, 43 Iowa, 48; *South Ottawa v. Perkins*, 94 U. S. 260. Compare *Beloit v. Morgan*, 7 Wall. 619.

9 *Ogdensburg etc. R. R. Co. v. Vermont etc. R. R. Co.* 6 Thomp. & C. 488.

10 See *ante*, § 98.

11 *Taymouth v. Kohler*, 35 Mich. 22; *Peterson v. Mayor etc.* 17 N. Y. 449; *Riche v. Ashbury Railw. etc. Co.* Law R. 7 H. L. 663, 672.

12 See *ante*, § 98.

13 See *Armstrong v. Stokes*, Law R. 7 Q. B. 598; *Inhabitants of Arlington v. Pierce*, 122 Mass. 270; *State v. Florida R. R. Co.* 15 Fla. 690; *People v. Swift*, 31 Cal. 26.

14 *Fiak v. Chicago etc. R. R. Co.* 4 Abb. N. S. 378; 53 Barb. 513.

CHAPTER X.

STOCK AND STOCKHOLDERS.

- § 106. Terms defined.
- § 106. Nature of property in stock.
- § 107. Power of corporation to deal in stock.
- § 108. Subscription to stock.
- § 109. Subscriptions prior to complete organization.
- § 110. Subscriptions upon condition.
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- § 114. Variation in amount of capital.
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- § 120. Discharge of subscriber from liability.
- § 121. Assent, estoppel, etc.
- § 122. Transfer of shares.
- § 123. Effects and incidents of transfers.
- § 124. Lien of the corporation on stock.
- § 125. Profits and dividends.
- § 126. Individual liability of stockholders.

§ 105. Terms defined.—In reference to a corporation, the word “capital,” for most purposes, signifies the aggregate of the sums subscribed and paid in, or secured to be paid in, by the shareholders.¹ The term “stock,” when not employed to denote the same thing as capital, has reference to the interests of the shareholders or individuals.² The interest of each individual shareholder is a share of the net produce of the capital stock of the corporation, when brought into one fund.³ A “share” is a mere ideal thing, and not a chattel personal susceptible of possession actual or constructive.⁴ In the Texas statutes.

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ute relating to the taxation of bank stock, the words "share" and "stock" are used as synonymous terms.⁶ The word "property," within the meaning of the Kentucky Civil Code, includes stock in an incorporated company.⁶

1 See *Hightower v. Thornton*, 8 Ga. 496; *Reid v. Eatonton Manuf. Co.* 40 Id. 98; *Palmer v. Lawrence*, 3 Sand. 181; *Mut. Ins. Co. v. Supervisors etc.* 4 N. Y. 442; *International Life Assur. Soc. v. Comm'rs etc.* 17 How. Pr. 206; 28 Barb. 318; *St. Louis etc. R. R. v. Lottin*, 30 Ark. 693; *State v. Morristown Fire Assoc.* 3 Zab. 196; *Burrall v. Bushwick R. R. Co.* 75 N. Y. 211, 216. Compare *New Haven v. City Bank*, 31 Conn. 106; *South Bay Co. v. Gray*, 30 Me. 547; *Bailey v. Clark*, 21 Wall. 284.

2 See *People v. Comm'rs etc.* 23 N. Y. 192, 220; *Burrall v. Bushwick R. R. Co.* 75 N. Y. 211, 216.

3 *Bradley v. Holdsworth*, 3 Mees. & W. 324.

4 *Arnold v. Ruggles*, 1 R. L. 165; and see *Dunn v. Com. Bank*, 11 Barb. 569.

5 *Harrison v. Vines*, 46 Tex. 15.

6 *Field v. Montmollin*, 5 Bush, 455.

§ 106. Nature of property in stock. — In some instances statutes declare shares and dividends to be personal property.¹ But independent of any statutory provision, shares in the stock of a corporation are deemed personal property,² or of the nature of choses in action.³ They are a subject of conversion, for which suit can be maintained, and a recovery of the value had.⁴ And, in Massachusetts, a contract for the sale of shares of stock is within the meaning of the statute of frauds.⁵ But stock is not regarded as money;⁶ nor are shares of stock, strictly speaking, chattels.⁷ And where lands are vested in the individual shareholders, and the management is only in the corporation, the shares are real estate.⁸

1 See *Union Bank of Tennessee v. State*, 9 Yerg. 490; *Myres v. Perigal*, 17 Eng. L. & Eq. 109; *Mohawk etc. R. R. Co. v. Clute*, 4 Paige, 384; *Cape Sable Co.'s Case*, 3 Bland, 670.

2 *Brightwell v. Mallory*, 10 Yerg. 196; *Tippets v. Walker*, 4 Mass. 595; *Gilpin v. Howell*, 5 Pa. St. 57; *Weaver v. Huntingdon etc. R. R. Co.* 50 Id. 314; *Griffith v. Watson*, 19 Kans. 23; *Johns v. Johns*, 1 Ohio St. 350; *Edwards v. Hall*, 6 DeGex M. & G. 74. *Contra*, *Welles v. Cowles*, 2 Conn. 567; *Price v. Price*, 6 Dana, 107.

3 *Howe v. Starkweather*, 17 Mass. 240; *Arnold v. Ruggles*, 1 R. L. 165; *Allen v. Pegram*, 16 Iowa, 163; *Slaymaker v. Gettysburg Bank*, 10 Pa. St. 373; *Rex v. Capper*, 5 Price, 217.

4 *Kuhn v. McAllister*, 1 Utah T. 273. But compare *Atkins v. Gamble*, 42 Cal. 94; 10 Am. R. 282.

5 *Tisdale v. Harris*, 20 Pick. 9; *Eastern R. R. Co. v. Benedict*, 10 Gray. 212. So, in Missouri: *Fine v. Hornsby*, 3 Mo. App. 61. But the statute of frauds does not apply to shares, stocks, etc. in England: *Watson v. Spratley*, 10 Exch. 222; *Humble v. Mitchell*, 11 Ad. & E. 205; and see *Whittemore v. Gibbs*, 24 N. H. 484; *Dawter v. Griffin*, 40 Ind. 383.

6 See *King v. Churchwardens etc.* 6 East, 182; *Nightengal v. Devisme*, 5 Burr. 2589.

7 *Howe v. Starkweather*, 17 Mass. 240; *Denton v. Livingston*, 9 Johns. 96; *Hutchins v. State Bank*, 12 Met. 421; *Arnold v. Ruggles*, 1 R. I. 165.

8 *Weekley v. Weekley*, 2 Younge & C. 281; *Bligh v. Brent*, id. 268; *Drybutter v. Bartholomew*, 2 P. Wms. 127.

§ 107. Power of corporation to deal in stock.— In England, corporations cannot, without an express power so to do, deal in their own shares;¹ but, without an express power, a corporation may deal in the shares of other corporations.² The rule is otherwise in the United States; the authorities holding that, in the absence of any statutory prohibition, a corporation may sell its own stock,³ take its own stock in pledge or payment,⁴ and even purchase its own stock;⁵ provided the transaction is *bona fide*, and not for the purpose of defrauding creditors.⁶ So, a bequest to a corporation of its own stock was held to be valid.⁷ But without a power specifically granted, or necessarily implied, a corporation cannot become a stockholder in another corporation;⁸ and especially where the object is to obtain the control or affect the management of the latter.⁹

1 *Re London etc. Bank*. Law R. 5 Ch. 444; *Re Marseilles etc. Railw. Co.* Law R. 7 Ch. 161; *Hope v. International etc. Soc.* Law R. 4 Ch. Div. 327.

2 *Re Asiatic Bank Corp.* Law R. 4 Ch. 232; *Re Bamed's Bank*, Law R. 3 Ch. 165.

3 *Robinson v. Beall*, 26 Ga. 17; *Supervisors etc. v. Wisconsin etc. R. Co.* 121 Mass. 460; *State Bank v. Fox*, 3 Blatchf. 431.

4 *Coleman v. Columbia Oil Co.* 51 Pa. St. 74; *Williams v. Savage Manuf. Co.* 3 Md. Ch. 4.8.

5 *City Bank v. Bruce*, 17 N. Y. 507; *Hartridge v. Rockwell*, R. M. Charit. 260. See *Brown v. Donnell*, 49 Me. 421; *Currier v. Slate Co.* 56 N. H. 202.

6 See *Gillett v. Moody*, 3 N. Y. 479; *State v. Smith*, 48 Vt. 266; *Sav. Bank v. Wulfekuhler*, 19 Kan. 60; *Brewster v. Hartley*, 37 Cal. 15.

7 *Rivanna Nav. Co. v. Dawsons*, 3 Gratt. 19.

8 *Talmage v. Pell*, 7 N. Y. 323, 348; *Mut. Sav. Bank v. Meriden Agency*, 24 Conn. 156; *Franklin Co. v. Lewiston Sav. Bank*, 63 Me. 43.

9 *Hardehurst v. Savannah R. R. Co.* 43 Ga. 13; *Sumner v. Marcy*, 3 Wood & M. 108; and see *Brewster v. Hartley*, 37 Cal. 15.

§ 108. Subscription to stock.—A subscription for shares in the capital stock of a corporation, duly made¹ and accepted,² confers mutual rights of contract.³ The advantages to be derived from being a member of the corporation, and the consequent right to participate in the pecuniary dividends, constitute the consideration for the engagement of the subscriber;⁴ and this consideration is sufficient to enable the company to maintain an action for a recovery of the amount subscribed.⁵ Each subscription for shares is an independent undertaking, in no way affected by the terms of other subscriptions;⁶ and subscribers are liable, each on his several contract only, and for the amount opposite his own name.⁷ Whatever the form or language of a subscription may be, the subscriber thereby assumes to pay for the stock in the mode prescribed by,⁸ and according to the conditions of the charter.⁹ An express promise to pay in terms is not necessary.¹⁰ A contract of subscription must, however, be in writing,¹¹ and must embody the terms necessary to constitute a complete contract on both sides.¹² But mere formal irregularities or defects do not avoid the subscription:¹³ as, for instance, the use of subscription papers, instead of a book.¹⁴ And the contract may be made out in form, from disconnected memoranda, by one duly authorized to act for the subscribers in that respect.¹⁵ A subscription to the articles of incorporation, with a statement of the number of shares opposite the name, is a sufficient and binding subscription for the stock, and takes effect upon the filing of the certificate.¹⁶ A subscription in the name of a third person, without authority, is an act which may be ratified.¹⁷ And subscriptions procured by an agent, acting without authority at the time, may be recovered by a corporation, provided the act of their pretended agent has been ratified.¹⁸ Rights of a corporation arising out of subscriptions to its stock, are not incapable

of assignment,¹⁹ and may be enforced by a company succeeding to the property and franchise of a previous one.²⁰

1 See *Kansas City Hotel Co. v. Hunt*, 57 Mo. 126; *North Mo. R. R. Co. v. Miller*, 31 Id. 19; *Beecher v. Dillsburg etc. R. R. Co.* 76 Pa. St. 306; *Hebb's Case*, Law R. 4 Eq. 9; *Adams' Case*, Law R. 13 Eq. 479.

2 *British etc. Tel. Co. v. Colson*, Law R. 6 Ex. 108; *Gorriessen's Case*, Law R. 8 Ch. 567; *Re Imperial Land Co.* Law R. 7 Ch. 587; *Cass v. Pittsburgh etc. R. R. Co.* 80 Pa. St. 31; *Junction etc. R. R. Co. v. Reve*, 15 Ind. 236.

3 *Marsh v. Burroughs*, 1 Woods, 463.

4 *Bish v. Bradford*, 17 Ind. 480; *Lake Ontario etc. R. R. Co. v. Mason*, 16 N. Y. 451; *Ohio St. College v. Love*, 16 Ohio St. 20; *Hartford etc. R. R. Co. v. Kennedy*, 12 Conn. 439; *Ashuelot etc. Co. v. Hoyt*, 56 N. H. 549; *Mahan v. Wood*, 44 Cal. 482; *Parker v. Northern etc. R. R. Co.* 33 Mich. 23; *Cottage St. Church v. Kendall*, 121 Mass. 528; *Birmingham etc. Railw. Co. v. White*, 1 Q. B. 282.

5 *Essex Bridge Co. v. Tuttle*, 12 Vt. 393; *Small v. Herkimer Manuf. Co.* 2 N. Y. 330; *St. Paul etc. R. R. Co. v. Robbins*, 23 Minn. 433; *First Nat. Bank v. Hurford*, 29 Iowa, 579; *Pendergast v. Turton*, 1 Younge & C. Ch. 97; *Athol Music Hall Co. v. Carey*, 116 Mass. 471.

6 *Conn. etc. R. R. Co. v. Bailey*, 24 Vt. 465; *Whittlesey v. Frantz*, 74 N. Y. 456.

7 *Price v. Grand Rapids etc. R. R. Co.* 18 Ind. 137; see *Erie etc. R. R. Co. v. Patrick*, 2 Abb. Ct. App. 72; 2 Keyes, 256.

8 *Fry v. Lexington etc. R. R. Co.* 2 Met. 314.

9 *Rensselaer Plank Road Co. v. Barton*, 16 N. Y. 457, note. See also *Buckfield Branch R. R. Co. v. Irish*, 39 Me. 44; *Danbury etc. R. R. Co. v. Wilson*, 22 Conn. 435; *Ogdensburgh etc. R. R. Co. v. Frost*, 21 Barb. 541; *Maroon R. R. Co. v. Vason*, 57 Ga. 314; *City Hotel Co. v. Dickinson*, 6 Gray, 586; *Peoria R. R. Co. v. Elting*, 17 Ill. 429; *White Mts. R. R. Co. v. Eastman*, 34 N. H. 147.

10 *Rensselaer Plank Road Co. v. Barton*, 16 N. Y. 457, note. Compare *Reed v. Richmond St. R. R. Co.* 50 Ind. 342; § 119, *post*.

11 *Pittsburgh etc. R. R. Co. v. Gazzam*, 32 Pa. St. 340; *Fothergill's Case*, Law R. 8 Ch. 270.

12 *Bucher v. Dillsburg etc. R. R. Co.* 76 Pa. St. 306; *Duchess etc. R. R. Co. v. Mabbett*, 58 N. Y. 397; *Belfast etc. Railw. Co. v. Moore*, 60 Me. 561; and see *Lake Ontario etc. R. R. Co. v. Curtis*, 80 N. Y. 219.

13 *Cayuga Lake R. R. Co. v. Kyle*, 64 N. Y. 185.

14 *Hamilton etc. Plank Road Co. v. Rice*, 7 Barb. 157; *Ashtabula etc. R. R. Co. v. Smith*, 15 Ohio St. 328; and see *Clements v. Todd*, 1 Ex. 268; *Brownlee v. Ohio etc. R. R. Co.* 18 Ind. 63; *Clark v. Continental Improvement Co.* 57 Id. 135; *Boston etc. R. R. Co. v. Wellington*, 113 Mass. 79; *St. Charles Manuf. Co. v. Britton*, 2 Mo. App. 290.

15 *Iowa etc. R. R. Co. v. Perkins*, 23 Iowa, 281.

16 *Dayton v. Borst*, 31 N. Y. 435; *Phoenix Warehousing Co. v. Badger*, 67 Id. 294.

17 *McCully v. Pittsburgh etc. R. R. Co.* 32 Pa. St. 25. Compare *State v. Smith*, 43 Vt. 266; *Phila. etc. R. R. Co. v. Cowell*, 26 Pa. St. 329; *Ticonic etc. Co. v. Lang*, 63 Me. 480.

18 *Walker v. Mobile etc. R. R. Co.* 34 Miss. 245.

19 *Morris v. Cheney*, 51 Ill. 451; *Downie v. Hoover*, 12 Wis. 174.

²⁰ *Swartwout v. Mich. etc. R. R. Co.* 24 Mich. 389; *Smith v. Hallett*, 24 Ind. 519.

§ 109. Subscriptions prior to complete organization.—Subscriptions to the capital stock may be received by a corporation before being fully organized;¹ and the right of membership is a sufficient consideration to sustain an action by the company after its complete incorporation, to recover calls on the stock.² But subscriptions cannot be taken, or if taken create no obligation, until all the preliminary statutory requirements have been complied with.³ If the charter declares that the persons subscribing the original articles, and those who subscribe to the stock in the manner to be provided by the by-laws, shall be a body corporate, no subscriptions will be binding until by-laws directing the mode of subscribing have been adopted.⁴ And one who merely agrees to subscribe for stock when the company's books shall be opened, does not thereby become liable for calls, but only for breach of agreement to the amount of actual damage sustained from his failure to subscribe.⁵

¹ *Bucksport etc. R. R. Co. v. Buck*, 65 Me. 536; *Boston etc. R. R. Co. v. Wellington*, 113 Mass. 79.

² *Lake Ontario R. R. Co. v. Mason*, 16 N. Y. 451; *Oregon etc. R. R. Co. v. Scoggin*, 3 Oreg. 161; *Penobscot R. R. Co. v. Dummer*, 40 Me. 172; *Gleaves v. Brick Church Turnp. Co.* 1 Sneed, 491; *Danbury etc. R. R. Co. v. Wilson*, 22 Conn. 435; *People's Ferry Co. v. Balch*, 8 Gray, 303; *Re New Buxton Lime Co.* Law R. 1 Ch. Div. 620; but see *Strasburg R. R. Co. v. Echternacht*, 21 Pa. St. 220.

³ *Burt v. Farrar*, 24 Barb. 518; *Taggart v. Western Md. R. R. Co.* 24 Md. 563; *Poughkeepsie etc. Plank Road Co. v. Griffin*, 24 N. Y. 150. Compare *Maliby v. Northwestern etc. R. R. Co.* 16 Md. 422.

⁴ *Carlisle v. Saginaw Valley etc. R. R. Co.* 27 Mich. 315.

⁵ *Thrasher v. Pike etc. R. R. Co.* 25 Ill. 393. Compare *Shibley v. Angle*, 37 N. Y. 627; *Barned v. Hamilton*, 2 Eng. Railw. Cas. 624.

§ 110. Subscriptions upon condition.—In general, conditional subscriptions may be received unless forbidden by the charter, and upon the performance of the conditions, the subscriptions become absolute.¹ Acceptance by the company of a part payment of a subscription, made upon conditions other than those named in the article of incorporation, is a sufficient concurrence in the

condition to create mutuality.² And the act of the president of an incorporated company, in accepting conditional subscriptions, binds the company.³ But it cannot be shown by parol evidence that an instrument, containing on its face an absolute written subscription, is conditional;⁴ nor is such evidence admissible to show that a note, absolute in terms, and given for the amount of a subscription, was given conditionally;⁵ but a subscription made on a blank sheet of paper, and subsequently transferred to the subscription books, without any further authority, may be shown to be conditional.⁶ An agreement between subscribers for stock in a corporation, made in anticipation of its organization, and separate from, but imposing conditions upon the subscription, itself absolute in its terms, cannot impair the validity of such subscription.⁷ And where a subscription is made upon condition that a certain number of shares shall be subscribed for, evidence cannot be introduced to show that such number has not been subscribed for by persons pecuniarily responsible;⁸ unless it appears that the corporation has acted in bad faith.⁹ Conditions must be open and made *bona fide*;¹⁰ otherwise they are invalid, and the subscriptions will be enforced as if unconditional.¹¹ A subscriber will not be permitted to avoid his liability on the ground that he merely signed at the request of the solicitor for the company, to induce others to subscribe.¹² Subscriptions may be legally conditioned as to the time, manner, or means of payment;¹³ or upon the adoption of a certain route for a road;¹⁴ or upon the location of a road within a certain distance of a town;¹⁵ or upon a certain time for the completion of a road;¹⁶ or upon the subscription of a prescribed amount to the capital stock before calls are made.¹⁷ But raising a part of the amount without a formal subscription of it, is equivalent to subscribing, and satisfies the last-mentioned condition.¹⁸ A conditional subscription to stock is a continuing offer, and becomes final and absolute when accepted;¹⁹ and actual performance

by the corporation of an alleged condition, is as binding on both parties as if the subscription had been absolute and unconditional.²⁰ A condition may be waived;²¹ as where a subscription is made upon the condition that a certain amount shall be raised, and the subscriber cooperates in the enterprise, and incurs liabilities with knowledge that such amount has not been subscribed, these acts operate as a waiver of the condition;²² and setting opposite a subscription the words, "to be expended between the C. river and the east line of the state," if a condition at all, is waived by the subscriber becoming a director, and acting as such.²³

1 Ashtabula etc. R. R. Co. v. Smith, 15 Ohio St. 323; Penobscot R. R. Co. v. White, 41 Me. 512; Miller v. Pittsburgh etc. R. R. Co. 40 Pa. St. 237; Dixon v. Evans Law R. 5 H. L. Cas. 606.

2 See Nichols v. Burlington etc. Co. 4 Greene, 42; St. Paul etc. R. R. Co. 23 Minn. 439.

3 Pittsburg etc. R. R. Co. v. Stewart, 41 Pa. St. 54. Compare Smith v. Plank Road Co. 30 Ala. 650.

4 Stewards etc. v. Town, 49 Vt. 29; Johnson v. Pensacola etc. R. R. Co. 9 Fla. 239; No. Car. R. R. Co. v. Leach, 4 Jones, 340; Thigpen v. Miss. Cent. R. R. 32 Miss. 348; Noble v. Callender, 20 Ohio St. 193.

5 Roche v. Roanoke Class. Sem. 56 Ind. 198; but see Parker v. Thomas, 19 Id. 213.

6 Tonica etc. R. R. Co. v. Stein, 21 Ill. 96.

7 White Hall etc. R. R. Co. v. Myers, 16 Abb. Pr. N. S. 34; Ridgefield etc. R. R. Co. v. Brush, 43 Conn. 86.

8 Penobscot R. R. Co. v. Dummer, 40 Me. 172; Salem Mill Dam Co. v. Ropes, 9 Pick. 187. Compare Evansville etc. R. R. Co. v. Wright, 33 Ind. 64.

9 Penobscot R. R. Co. v. White, 41 Me. 512.

10 See Swartwout v. Mich. etc. R. R. Co. 24 Mich. 339; Barnett's Case, Law R. 18 Eq. 507; Mann v. Cooke, 20 Conn. 178; Graff v. Pittsburgh etc. R. R. Co. 31 Pa. St. 489; Melvin v. Lamar Ins. Co. 80 Ill. 448; 23 Am. R. 199.

11 Minor v. Mechanics' Bank, 1 Peters, 46; Robinson v. Pittsburgh etc. R. R. Co. 32 Pa. St. 334; Downie v. White, 12 Wis. 176.

12 Pickering v. Templeton, 2 Mo. App. 424.

13 People v. Chambers, 43 Cal. 201; Swatara R. R. Co. v. Brune, 6 Gill, 41; Milwaukee etc. R. R. Co. v. Field, 12 Wis. 340; Van Allen v. Ill. Cent. R. R. Co. 7 Bosw. 515; Mitchell v. Rome R. R. Co. 17 Ga. 574; Smith v. Plank Road Co. 30 Ala. 650; Highland Turnp. Co. v. McKean, 11 Johns. 98.

14 Rhey v. Ebsenburg etc. Plank Road Co. 27 Pa. St. 261; Evansville etc. R. R. Co. v. Shearer, 10 Ind. 244; Racine etc. Bank v. Ayres, 12 Wis. 512. Compare Fort Edward etc. Plank Road Co. v. Payne, 15 N. Y. 683; Troy etc. R. R. Co. v. Tibbetts, 18 Barb. 297; Dix v. Shaver, 14 Hun, 392.

15 Jewett v. Lawrenceburg etc. R. R. Co. 10 Ind. 539. See O'Neal v. King, 3 Jones, 517; Chapman v. Mad River etc. Railw. Co. 6 Ohio St. 119; Lake Ontario etc. R. R. Co. v. Curtis, 80 N. Y. 219.

16 Burlington etc. R. R. Co. v. Boestler, 15 Iowa, 555.

17 Phila. etc. R. R. Co. v. Hickman, 28 Pa. St. 318; Cass v. Pittsburgh etc. R. R. Co. 80 Id. 31; Brewers' Fire Ins. Co. v. Burger, 10 Hun, 56; Penobscot etc. R. R. Co. v. Dunn, 37 Me. 537; Ridgefield etc. R. R. Co. v. Brush, 43 Conn. 86; Goff v. Winchester College, 6 Bush, 443.

18 Springfield St. Railw. Co. v. Sleeper, 121 Mass. 29.

19 Taggart v. West Md. R. R. Co. 24 Md. 563; Bedford R. R. Co. v. Bowser, 48 Pa. St. 29; Adams' Case, Law R. 13 Eq. 479.

20 Chamberlain v. Painesville R. R. Co. 15 Ohio St. 225; Burlington etc. R. R. Co. v. Palmer, 43 Iowa, 222.

21 Wheatcroft's Case, 29 L. T. N. S. 324; Taylor v. Fletcher, 15 Ind. 80.

22 Hutchins v. Smith, 46 Barb. 235; and see Wilmington etc. R. R. Co. v. Robeson, 5 Ired. 301; Dayton etc. Railw. Co. v. Hatch, 1 Disn. 84; Ossipee Manuf. Co. v. Canney, 54 N. H. 296.

23 Lane v. Brainerd, 30 Conn. 565. Compare Re Metrop. etc. Co. Law R. 9 Ch. App. 102.

§ 111. Subscriptions as affected by fraud.—A contract of subscription procured through fraud cannot be enforced against the subscriber;¹ and the general rule, that parol representations are inadmissible to vary the terms of a written agreement,² has no application to representations amounting to fraud on the part of the company, made at the time of subscribing, and whereby the subscription was obtained.³ But a contract of subscription procured by fraud is valid until disaffirmed;⁴ and the subscriber must act promptly in disaffirming it, after knowledge of the fraud,⁵ and the case must show that he was not misled by his own negligence, or he cannot claim relief.⁶ And a discharge from the fraudulent contract cannot be obtained by one who was himself a party to the fraud.⁷ One who was induced to purchase stock through the fraudulent representations of the agents of a corporation, is not liable to the receiver of such corporation for the amount of his subscription;⁸ but it is otherwise where the subscriber was himself one of the fraudulent originators of the undertaking.⁹ A mere colorable subscription by a person of influence, shown to another to induce him to subscribe, does not avoid the latter's subscription unless he was thereby influenced to subscribe;¹⁰ nor can a subscriber avoid his subscription

because it was founded on a prospectus containing exaggerated views of the advantages of the company, but not any material misstatement of fact,¹¹ and from which no material existing facts were omitted;¹² nor is it a defense to an action upon a stock subscription, that other subscribers, by means of a fraudulent agreement, obtained their stock upon more favorable terms.¹³ But where one acting in good faith was induced by false and fraudulent misstatements, chargeable to the company, to give his note for a subscription, no action can be maintained thereon as between original parties.¹⁴ One who is induced by fraud on the part of the promoters of a proposed corporation, to pay money for shares, is not limited to an action for damages against the corporation, but may sue the individuals by whom the fraud was practiced.¹⁵ An action to recover back a subscription cannot be maintained unless the case shows some misrepresentation or fraud, or such a failure of the objects and purposes of a corporation as to amount to a virtual dissolution.¹⁶

1 *Hester v. Memphis etc. R. R. Co.* 32 Miss. 378; *New Orleans etc. R. R. Co. v. Williams*, 16 La. An. 315; *Upton v. Tribilcock*, 91 U. S. 45; *Atkinson v. Pocock*, 12 Jur. 60; *Smith v. Reese River Co.* Law R. 4 H. L. 64; *Burnes v. Pennel*, 2 H. L. Cas. 497.

2 See *Smith v. Plank Road Co.* 30 Ala. 650; *Ogilvie v. Knox Ins. Co.* 22 How. 389; *Goodrich v. Reynolds*, 31 Ill. 490; *Miss. R. R. Co. v. Cross*, 20 Ark. 443; *Conn. etc. R. R. Co. v. Bailey*, 24 Vt. 465.

3 *Blodgett v. Morrill*, 20 Vt. 509; *Kennebec etc. R. R. Co. v. Waters*, 24 Me. 369; *Ellison v. Mobile etc. R. R. Co.* 38 Miss. 572; *Martin v. Pensacola etc. R. R. Co.* 8 Fla. 370; *Crump v. U. S. Min. Co.* 7 Gratt. 352; *East Tenn. etc. R. R. Co. v. Gammon*, 5 Sneed, 567; *Rives v. Plank Road Co.* 30 Ala. 82; *Davis v. Dumont*, 37 Iowa, 47; *Piscataqua Ferry Co. v. Jones*, 30 N. H. 491; *Water Valley Manuf. Co.* 53 Miss. 655; *Custar v. Titusville Gas etc. Co.* 63 Pa. St. 331; *Miller v. Wildcat etc. Co.* 57 Ind. 241; *Vreeland v. New Jersey Stone Co.* 29 N. J. Eq. 188.

4 *Upton v. Englehart*, 3 Dill. 496.

5 *Cunningham v. Edgefield etc. R. R. Co.* 2 Head, 23; *Dynes v. Shaffer*, 19 Ind. 165; *Upton v. Hansborough*, 3 Biss. 417; *Hughes v. Antietam Manuf. Co.* 34 Md. 316; *Upton v. Tribilcock*, 91 U. S. 45; see also *Centre etc. Turnp. Co. v. McConaby*, 16 Serg. & R. 140; *Re Hop & Malt Exchange etc. Co.* Law R. 1 Eq. 483.

6 *Upton v. Englehart*, 3 Dill. 496; *Oakes v. Turquand*, Law R. 2 H. L. 325.

7 *Southern Plank Road Co. v. Hixon*, 5 Ind. 166; *Litchfield Bank v. Church*, 29 Conn. 137; *Mann v. Cooke*, 20 Conn. 178; *Perkins v. Savage*, 15 Wend. 412; *Graff v. Pittsburgh etc. R. R. Co.* 31 Pa. St. 486.

8 *Litchfield Bank v. Peck*, 29 Conn. 334.

9 *Litchfield Bank v. Church*, 29 Conn. 157.

10 *Walker v. Mobile etc. R. R. Co.* 34 Miss. 245; see *Pickering v. Templeton*, 2 Mo. App. 424; *State v. Jefferson Turnp. Co.* 3 Humph. 305; *Downie v. White*, 12 Wis. 176.

11 *Denton v. Macniel*, Law R. 2 Eq. 352; *Ross v. Estates Investment Co.* Law R. 3 Ch. 682; *Blackburn's Case*, 3 Drew. 409; *Waterhouse v. Jamieson*, Law R. 2 Sc. & D. 29.

12 *Pulsford v. Richards*, 19 Eng. L. & Eq. 337. Compare *Vane v. Cobbold*, 1 Ex. 798.

13 *Anderson v. Newcastle etc. R. R. Co.* 12 Ind. 376.

14 *Occidental Ins. Co. v. Ganzhorn*, 2 Mo. App. 206. Compare *Goodrich v. Reynolds*, 31 Ill. 49.

15 *Paddock v. Fletcher*, 42 Vt. 339.

16 *Kelsey v. Northern Light Oil Co.* 54 Barb. 111. Compare *Jarrett v. Kennedy*, 6 Law J. N. S. 319; *Atkinson v. Pocock*, 12 Jur. 69.

§ 112. **Payment for stock.**—The capital stock of a corporation which is paid in, and promised to be paid in,¹ is a trust fund for the payment of corporate debts,² which the trustees cannot squander, or give away except for an equivalent consideration.³ In short, the trust cannot be defeated by any device short of an actual payment in good faith.⁴ And any private agreement between a subscriber and the agent of a corporation, that the subscriber shall not be called on to pay, or that in a certain event he shall be released, or which otherwise limits his liability, is void, not only against creditors of the company or their representative, but even against the company itself, if unauthorized by it.⁵ But stock need not necessarily be paid for in money;⁶ payment may be made in bank checks, if the checks are good;⁷ or in the stock of another corporation;⁸ or in promissory notes, or notes and mortgages;⁹ or in labor or materials;¹⁰ or in damages which the company is liable to pay;¹¹ and the company may compromise subscriptions which are doubtful, by receiving part payment.¹² But, in general, the sale of stock at a less rate than the price fixed in the charter is a fraud upon the law and the stockholders.¹³ And where the statute authorizing the formation of a corporation requires the capital stock to be paid in in money, a payment of the full value in any other property is not a compliance with the provisions of the statute.¹⁴

- 1 See § 106, *ante*; *Curry v. Woodward*, 53 Ala. 371.
- 2 *Reid v. Eatonton Manuf. Co.* 40 Ga. 98; *Van Cott v. Van Brunt*, 2 Abb. N. C. 232; *Re Bachman*, 12 Bank. Reg. 223; *Bassett v. St. Albans etc. Co.* 47 Vt. 313.
- 3 *Upton v. Tribblecock*, 1 Otto, 45; *Currier v. Lebanon State Co.* 56 N. H. 282; *Marsh v. Burrows*, 1 Wood, 462; *Osgood v. King*, 42 Iowa, 473; *Melvin v. Lamar Ins. Co.* 80 Ill. 444.
- 4 *Sawyer v. Hoag*, 17 Wall. 610; and see *Boynton v. Hatch*, 47 N. Y. 225; *Schaeffer v. Mo. etc. Ins. Co.* 48 Mo. 248; *Putnam v. New Albany*, 4 Biss. 363; *Re Baglan Hall Colliery Co.* Law R. 5 Ch. 346; *Guest v. Worcester Railw. Co.* Law R. 4 Conn. P. 9.
- 5 *New Albany etc. R. R. Co. v. Fields*, 10 Ind. 187; *Bavington v. Phila. etc. R. R. Co.* 34 Pa. St. 353; *Swartwout v. Mich. etc. R. R. Co.* 24 Mich. 404. And see *Whitehall etc. R. R. Co. v. Myers*, 16 Abb. Pr. N. S. 34.
- 6 *Fothergill's Case*, Law R. 8 Ch. 270; *Adamson's Case*, Law R. 18 Eq. 670; *Pittsburgh etc. R. R. Co. v. Stewart*, 41 Pa. St. 54; *Cincinnati etc. R. R. Co. v. Clarkson*, 7 Ind. 595. But compare *Neuse River Nav. Co. v. Comm'r's etc.* 7 Jones' L. 275.
- 7 *Crocker v. Crane*, 21 Wend. 211; *Comins v. Coe*, 117 Mass. 45; *People v. Stockton etc. R. R. Co.* 45 Cal. 306; 13 Am. R. 173.
- 8 *East New York etc. R. R. Co. v. Lighthall*, 36 How. Pr. 481; 6 Robt. 407.
- 9 *Goodrich v. Reynolds*, 31 Ill. 490; *Ogdensburgh etc. R. R. Co. v. Wooley*, 3 Abb. Ct. App. 398; *Stoddard v. Shetucket Foundry Co.* 34 Conn. 542; *Strauss v. Eagle Ins. Co.* 5 Ohio St. 59; *Andrews v. Hart*, 17 Wis. 297; *McRae v. Russell*, 12 Ired. 224.
- 10 *American Silk Works v. Salomon*, 4 Hun, 135; 6 Thomp. & C. 352; *Edwards v. Brangler etc. Co.* 27 La. An. 118; *Ohio etc. R. R. Co. v. Cramer*, 23 Ind. 490; *Pellatt's Case*, Law R. 2 Ch. 627; *Simpson's Case*, Law R. 7 Eq. 273.
- 11 *Phila. etc. R. R. Co. v. Hickman*, 28 Pa. St. 318.
- 12 *Phila. etc. R. R. Co. v. Hickman*, 28 Pa. St. 318. But see *Henry v. Vermillion etc. R. R. Co.* 17 Ohio, 187.
- 13 *Sturges v. Stetson*, 1 Biss. 246; *O'Brien v. Chicago etc. R. R. Co.* 53 Barb. 564; *Mann v. Cooke*, 20 Conn. 177, 188. But compare *Re Anglo-Danubian etc. Co.* Law R. 20 Eq. 339; *Knowlton v. Congress Spring Co.* 87 N. Y. 518.
- 14 *People v. Troy House Co.* 44 Barb. 625. See, as to subscriptions payable in land, *Goodin v. Evans*, 18 Ohio St. 150; *Evansville etc. R. R. Co. v. Wright*, 38 Ind. 64; *Boynton v. Hatch*, 47 N. Y. 225.

§ 113. Subscriptions as connected with commencement of business.—According to the English rule, unless it is otherwise provided, corporations may commence business before the whole or any portion of the nominal capital has been subscribed.¹ But the rule is otherwise in the United States;² and where the capital stock and the number of shares are fixed, a corporation cannot commence the business, to carry on which it is created, before the whole stock is subscribed, unless by

legislative enactment to that effect;³ and no valid assessments or calls can be made against a subscriber until all the shares are taken,⁴ unless by express agreement between the subscriber and the corporation.⁵ But the rule as stated does not prevent the corporation from transacting preliminary business or making assessments for preliminary purposes.⁶ In making up the capital necessary to be subscribed, the unpaid subscriptions of insolvent persons, infants, or married women, are to be excluded.⁷ But mere inability to pay at the time of subscribing, or subsequent insolvency, will not exclude the subscriptions.⁸ Subscriptions made upon condition cannot come in, unless it be shown that the condition has been complied with or waived.⁹ A contractor's agreement to accept stock, in payment for constructing the company's road, cannot be counted toward the amount which must be subscribed to commence organization.¹⁰ The requirement of a statute that a certain percentage of the amount subscribed must be paid in before organization, means a certain percentage of the gross amount,¹¹ and not of each subscription.¹²

1 See *MacDougall v. Jersey Imperial Hotel Co.* 2 Hem. & M. 323; *Lake Superior Nav. Co. v. Morrison*, 21 Up. Can. C. J. 217; *Pierre v. Jersey Water Works Co.* Law R. 5 Ex. 209; *North Stafford Steel etc. Co. v. Ward*, Law R. 3 Ex. 172; *Norwich etc. Nav. Co. v. Theobald*, 1 Moody & M. 151.

2 See *Troy R. R. Co. v. Newton*, 8 Gray. 596; *Willamette Freighting Co. v. Staunus*, 4 Oreg. 261; *Fox v. Allensville Co.* 48 Ind. 31; *Penobscot R. R. Co. v. White*, 41 Me. 512.

3 *Stoops v. Greensburgh Plank Road Co.* 10 Ind. 47; *Selma R. R. Co. v. Anderson*, 51 Miss. 629; *Livesey v. Omaha Hotel Co.* 5 Neb. 50; *Oldtown etc. R. R. Co. v. Veazie*, 39 Me. 571; *Hughes v. Antietam Manuf. Co.* 34 Md. 316; *Brouwer v. Appleby*, 1 Sand. 158.

4 *Hughes v. Antietam Manuf. Co.* 34 Md. 316; *Cent. Turnp. Corp. v. Valentine*, 10 Pick. 142; *Peoria etc. R. R. Co. v. Preston*, 35 Iowa, 115.

5 *Emmitt v. R. R. Co.* 31 Ohio St. 23; *Bucksport R. R. Co. v. Buck*, 65 Me. 538; *Iowa etc. R. R. Co. v. Perkins*, 28 Iowa, 281; *Estell v. Knightstown Turnp. Co.* 41 Ind. 174.

6 See *Penobscot R. R. Co. v. Dummer*, 40 Me. 172; *Minor v. Mechanics' Bank*, 1 Peters, 46; *Schenectady etc. Plank Road Co. v. Thatcher*, 11 N. Y. 162.

7 *Phillips v. Covington Bridge Co.* 2 Met. (Ky.) 219.

8 *Penobscot R. R. Co. v. White*, 41 Me. 511; *Salem Mill Dam Co. v. Ropes*, 9 Pick. 187.

9 Belfast etc. R. R. Co. v. Cottrell, 66 Me. 185; Central Turnp. Co. v. Valentine, 10 Pick. 142; People v. Chambers, 43 Cal. 201.

10 New York etc. R. R. Co. v. Hunt, 39 Conn. 75. Compare Phila. etc. R. R. Co. v. Hickman, 23 Pa. St. 318.

11 Rens. etc. Plank Road Co. v. Boston, 16 N. Y. 457, note; Lake Ontario etc. R. R. v. Mason, 16 N. Y. 451.

12 Eastern Plank Road Co. v. Vaughan, 14 N. Y. 546.

114. Variation in amount of capital.—A corporation has not implied power to vary the amount of its capital as originally fixed;¹ and every attempt of the corporation to exert such a power before it is conferred, by any direct or express act of its officers, is void.² And where a power to vary the capital is expressly given to the corporation, such power cannot be exercised by the directors until they have been authorized by the stockholders.³ The requisite assent of the stockholders may, however, be shown by their conduct and acquiescence, without a formal vote.⁴ Where the capital is confined between two limits, the corporation may begin with the smaller capital and extend it to the larger.⁵ And where a corporation is authorized by the charter to vary its capital, the power will be liberally construed.⁶

1 Mechanics' Bank v. New York etc. R. R. Co. 13 N. Y. 599; Wood v. Dumner, 3 Mason, 308; Railroad Co. v. Allerton, 18 Wall. 233; Salem Mill Dam Corp. v. Ropes, 6 Pick. 23; and see Bery v. Marletta etc. Railw. Co. 26 Ohio St. 673; Knowlton v. Congress etc. Spring Co. 14 Blatchf. 364; Smith v. Goldsworthy, 4 Q. B. 430. Compare Teasdale's Case, Law R. 9 Ch. 54; Bridgeport Bank v. N. Y. etc. R. R. Co. 30 Conn. 231.

2 New York etc. R. R. Co. v. Schuyler, 34 N. Y. 30; Curry v. Scott, 54 Pa. St. 270.

3 Eldman v. Bowman, 58 Ill. 444; 11 Am. R. 90; Railroad Co. v. Allerton, 18 Wall. 233.

4 Payson v. Stoevers, 2 Dill. 423.

5 Gray v. Portland Bank, 3 Mass. 364.

6 Bardwell v. Sheffield Water Works Co. Law R. 14 Eq. 517.

§ 115. Preferred shares of stock.—Preferred shares are such as entitle the holders thereof to a priority of dividends over holders of common shares;¹ but without the actual authority of law,² or the consent of the holders of the common shares, the power to issue preferred shares of stock does not exist.³ Generally, the

holders of preferred shares are entitled to priority as it respects dividends only, and as to assets or capital, they rank with ordinary shareholders.⁴ But preference capital may be issued under a power clearly conferred;⁵ and when such power is properly exercised, the holders of such capital will, in the division of assets, rank before and perhaps exclude the ordinary members.⁶ A power to create preferred shares must exist in the corporation as originally formed, and is not necessarily implied in a power to increase the capital stock.⁷ And under a power to issue a certain number of preferred shares, the stockholders have no authority, by resolution, to issue a greater number.⁸ Interest or dividends on preferred shares can be paid only out of profits actually and *bona fide* earned;⁹ any agreement to the contrary is opposed to public policy and void.¹⁰ A distinction between dividends upon preferred stock and those upon common stock is, that in regard to the latter, the question of their declaration is a matter of discretion with the directors;¹¹ but in regard to the former, the decision of the directors is not conclusive, and the question of ability to pay is to be decided by the court whose interposition is invoked.¹²

1 See *Taft v. Hartford etc. R. R. Co.* 8 R. L. 335; *Burt v. Rattle*, 31 Ohio St. 114; *Bailey v. Railroad Co.* 1 Dill. 174; 17 Wall. 96; *Re London India Rubber Co.* Law R. 5 Eq. 519.

2 *Prouty v. Mich. etc. R. R. Co.* 1 Hun. 655; *Jones v. Terre Haute etc. R. R. Co.* 57 N. Y. 196; *March v. Eastern R. R. Co.* 43 N. H. 516; *Matthews v. Great Northern Railw. Co.* 28 Law J. Ch. 375; *Sturges v. Eastern Union Railw. Co.* 7 De Gex M. & G. 158.

3 See *Kent v. Quicksilver Min. Co.* 12 Hun. 53; *Hoyt v. Quicksilver Min. Co.* 17 id. 168, *aff'd in Ct. App.* 9 Weekly Dig. 187; 73 N. Y. 159; *Bates v. Androscoggin Railw. Co.* 49 Me. 491; *Curry v. Scott*, 54 Pa. St. 370.

4 *Re London India Rubber Co.* Law R. 5 Eq. 519.

5 *Re Bangor etc. Slab Co.* Law R. 20 Eq. 55.

6 *Re Bangor etc. Slab Co.* Law R. 20 Eq. 55.

7 *Hutton v. Scarborough Cliff Hotel Co.* 2 Drew. & S. 514; *Re Nat. Patent Steam Fuel Co.* 4 Drew. 529.

8 *Melhado v. Hamilton*, W. N. 28 L. T. N. S. 578; 29 id. 364.

9 *Pittsburgh etc. R. R. Co. v. Alleghany County*, 63 Pa. St. 126; *Macdougall v. Jersey Imp. Hotel Co.* 2 Hem. & M. 528.

10 *Pittsburgh etc. R. R. Co. v. Alleghany County*, 63 Pa. St. 126; *Lockhart v. Van Alstyne*, 31 Mich. 76; 18 Am. R. 156; and see *Curran v.*

Arkansas, 15 How. 304; Taft v. Hartford etc. R. R. Co. 8 R. I. 310; 9 Am. R. 578; Thompson v. Erie Railw. Co. 42 How. Pr. 68; 11 Abb. Pr. N. S. 188.

11 See Rand v. Hubbell, 115 Mass. 461; Pratt v. Pratt, 33 Conn. 446; Richardson v. Vt. etc. R. Co. 44 Vt. 613; St. John v. Erie R. R. Co. 16 Blatchf. 271; 23 Wall. 136.

12 See Bailey v. Railroad Co. 1 Dill. 174; 17 Wall. 96; West Chester etc. R. R. Co. v. Jackson, 77 Pa. St. 321; Rutland R. R. Co. v. Thrall, 35 Vt. 536.

§ 116. **Calls.**—The debt created by a subscription is entire, and the calls made by the company merely fix the amount and the times when the installments of that debt should be paid.¹ A call may mean either the resolution that a call be made,² or its notification, or the time when it is payable.³ The power to make calls is incident to companies having their capital divided into shares,⁴ and is generally reposed in the board of directors.⁵ But directors cannot delegate the authority to the treasurer.⁶ And in order to make calls valid, the number and qualification of directors fixed by the charter must be adhered to;⁷ and the call must be made at a board meeting when this is required.⁸ But a call made by directors *de facto* is valid;⁹ and trifling irregularities will not invalidate a call.¹⁰ Whether made by the company at large, or by the directors, calls should equally affect all;¹¹ and should be made for *bona fide* corporate purposes.¹² The making of calls for purposes *ultra vires*,¹³ or the attempt to enforce them against one who was fraudulently induced by the company or its agents to take shares,¹⁴ will be restrained in equity,¹⁵ or the unlawful act or proceeding will be vacated.¹⁶ And to an action at law by the company against a shareholder for calls, it is a good plea that the defendant was induced by fraud to become a shareholder.¹⁷ A call made by directors having a general power to make calls is not invalid because imposed for a gross sum payable in several installments.¹⁸ Unless the charter requires a written notice of calls, a verbal notice is sufficient.¹⁹ And notice may be given by publication in the newspapers where the corporation usually transacts its business.²⁰ But where the charter expressly requires

notice to be given in certain newspapers, and for a certain number of days, before calls shall be valid, the requirement must be observed, or there can be no recovery upon a call.²¹ The affidavit of the newspaper clerk is sufficient evidence of the publication of a notice of calls in a newspaper.²²

- 1 *Small v. Herkimer Manuf. Co.* 2 N. Y. 330.
- 2 See *In re Londonderry etc. Railw. Co.* 6 Eng. Railw. Cas. 1; *Ambergate etc. Railw. Co. v. Mitchell*, 4 Ex. 540.
- 3 *Ambergate etc. Railw. Co. v. Mitchell*, 4 Ex. 540; *Shaw v. Rowley*, 16 Mees. & W. 810.
- 4 See *Hamilton etc. Plank Road Co. v. Rice*, 7 Barb. 157; *Seymour v. Sturgess*, 26 N. Y. 124; § 163, *ante*.
- 5 See *Ambergate etc. Railw. Co. v. Mitchell*, 4 Ex. 540; *Seymour v. Sturgess*, 26 N. Y. 124; *Bouton v. Dry Dock etc. Stago Co.* 4 E. D. Smith, 430; *Hann v. Mulberry etc. Gravel Road Co.* 33 Ind. 103; *Williamette Freighting Co. v. Stannus*, 4 Oreg. 261; *Stratford etc. Railw. Co. v. Stratton*, 2 Barn. & Adol. 518.
- 6 *Silver Hook Road v. Greene*, 12 R. I. 336. Compare *Hays v. Pittsburgh etc. R. R. Co.* 38 Pa. St. 81.
- 7 *Macon etc. R. R. Co. v. Vason*, 57 Ga. 314.
- 8 *Kirk v. Bell*, 16 Q. B. 20; and see *Howbeach Coal Co. v. Leagie*, 5 Hurl. & N. 151.
- 9 *Eakright v. Logansport R. R. Co.* 13 Ind. 404; *Swansea Dock Co. v. Levein*, 20 Law J. Ex. 44; and see *Steinmetz v. Versailles etc. Co.* 57 Ind. 457; *Walker v. Flemming*, 70 No. Car. 433; *Hanover Junction etc. R. R. Co. v. Grubb*, 82 Pa. St. 36; but compare *Garden Gully etc. Mining Co. v. McLister*, Law R. 1 H. L. 39.
- 10 *Sheffield Railw. Co. v. Woodcock*, 7 Mees. & W. 574; *Shackleford v. Dangerfield*, Law R. 3 Com. P. 407.
- 11 *Preston v. Grand Dock Co.* 11 Sim. 327; *Sagory v. Dubois*, 3 Sand. Ch. 466; *Melvin v. Lamar Ins. Co.* 80 Ill. 446; *Gilbert's Case*, Law R. 5 Ch. 559.
- 12 *Hartford etc. R. R. Co. v. Croswell*, 5 Hill, 383; *Dorris v. Sweeny*, 60 N. Y. 43; *South Georgia etc. R. R. Co. v. Ayers*, 56 Ga. 230; *Stevens v. Rutland etc. R. R. Co.* 23 Vt. 545; *Welland Railw. Co. v. Blake*, 6 Hurl. & N. 410; *Shropshire etc. Railw. Co. v. Anderson*, 3 Ex. 401.
- 13 See *Ottawa etc. R. R. Co. v. Black*, 73 Ill. 262; *Hodgkinson v. National etc. Ins. Co.* 4 DeGex & J. 422; 26 Beav. 473.
- 14 *Smith v. Reese River Co.* Law R. 4 H. L. 64; *Walker v. Mobile R. R. Co.* 34 Miss. 245; *Upton v. Englehart*, 3 Dill. 436.
- 15 *Richardson v. Larpent*, 2 Younge & C. 507; *Thorpe v. Hughes*, 3 Mylne & C. 742; *Hodgkinson v. National etc. Ins. Co.* 4 DeGex & J. 422, 26 Beav. 473; *Hays v. Ottawa etc. R. R. Co.* 61 Ill. 422; *Samuel v. Hoilday*, 1 Woolw. 400; *Dodge v. Woolsey*, 18 How. 331.
- 16 *Hays v. Ottawa etc. R. R. Co.* 61 Ill. 422.
- 17 *Bwlch-y-plwm Lead Min. Co. v. Daynes*, Law R. 2 Ex. 324.
- 18 *Birkenhead etc. R. R. Co. v. Webster*, 4 Eng. L. & Eq. 461; *Ambergate R. R. Co. v. Norcliffe*, 4 Id. 461; and see *Hann v. Mulberry etc. Gravel Road Co.* 33 Ind. 103.
- 19 *Smith v. Plank Road Co.* 30 Ala. 650.

20 *Hall v. U. S. Ins. Co.* 5 Gill, 494; and see *Great North of England Railw. Co. v. Biddulph*, 7 Mees. & W. 243; but compare *Ala. etc. R. R. Co. v. Rowley*, 9 Fla. 608.

21 *Macon etc. R. R. Co. v. Vason*, 57 Ga. 314.

22 *Andrews v. Ohio etc. R. R. Co.* 14 Ind. 169.

§ 117. **Assessments.**—The term “assessment,” as applied to corporate stocks, means a rating by the members or board of directors, by installments, of which notice is usually required to be given.¹ The power of a corporation to assess, for its own use, a sum of money upon the corporators, and compel them by action to pay it, must be deduced from the act of incorporation,² or be derived from an express promise.³ Without a special authority derived from the charter or statute, paid corporate stock cannot be assessed;⁴ and where the authority to assess is so vested in the corporation, as distinguished from the board of directors, the power cannot be delegated to the latter without special authority so to do.⁵ And subsequent illegal assessments cannot be made upon a presumption of assent founded upon assent to former illegal assessments.⁶ Where the charter limits the amount of assessments to a fixed sum per share, assessments beyond that sum are void.⁷ So, where the charter provides that the capital stock shall consist of not less than a certain number of shares, assessments made before the necessary amount is subscribed are not binding.⁸ And if a subscription is expressed to be conditional, it must be shown that the condition has been performed or waived, before an assessment can be made.⁹ Where the number of shares of the capital stock is not fixed by the charter, the number must be determined by the directors or the stockholders before any assessment can be made thereon.¹⁰ Directors having by statute full discretionary power as to the time and manner of payment of subscriptions may, in laying assessments, require the whole subscription to be paid at once, or allow payment in installments.¹¹ A stipulation in the contract of subscription, that it shall be payable only on the call of the company, is operative as

between stockholders, but will not be permitted to defeat the rights of creditors.¹²

1 Spangler v. Indiana etc. R. R. Co. 21 Ill. 276. As to notice: see *Turnp. Co. v. Meriwether*, 5 B. Mon. 13; *Atlantic Delaine Co. v. Mason*, 5 R. I. 463; *Sheffield etc. Railw. Co. v. Woodcock*, 7 Mees. & W. 574; *Scarlett v. Academy of Music*, 43 Md. 203.

2 Franklin Glass Co. v. White, 14 Mass. 296; *Franklin Glass Co. v. Alexander*, 2 N. H. 350; *Knowle v. Beatty*, 1 McLean, 41.

3 First Presbyterian Cong. v. Quackenbush, 10 Johns. 217; *Mayor etc. v. McKee*, 2 Verg. 167; *Bangor House Proprietary v. Hinckley*, 12 Me. 38; *Katania Land Co. v. Jernegan*, 126 Mass. 155.

4 Atlantic Delaine Co. v. Mason, 5 R. I. 463; see *State v. Morris-town Fire Assoc.* 3 Zab. 115.

5 Ex parte Winsor, 3 Story, 411; see *Sullivan v. Triunfo etc. Min. Co.* 29 Cal. 585.

6 Atlantic Delaine Co. v. Mason, 5 R. I. 463; *Somerset etc. R. R. Co. v. Cushing*, 45 Me. 524.

7 Great Falls etc. R. R. Co. v. Copp, 38 N. H. 124; *Lewey's Island R. R. Co. v. Linton*, 49 Me. 451.

8 Oldtown etc. R. R. Co. v. Yeazle, 39 Me. 571; *Salem Mill Dam Corp. v. Ropes*, 6 Pick. 23; *Stoneham Branch R. R. v. Gould*, 2 Gray, 277; *Central R. R. v. Johnson*, 30 N. H. 390; *Peoria etc. R. R. Co. v. Preston*, 35 Iowa, 115; *Norwich etc. Nav. Co. v. Theobald*, 1 Moody & M. 151.

9 Troy etc. R. R. Co. v. Newton, 8 Gray, 596; *Eastern Plank Road Co. v. Vaughan*, 14 N. Y. 546; *Livesey v. Omaha Hotel Co.* 5 Neb. 50; *Ticonic Water Power Co. v. Lang*, 63 Me. 480. See § 110, ante.

10 Troy etc. R. R. Co. v. Newton, 8 Gray, 596; *Somerset etc. R. R. Co. v. Cushing*, 45 Me. 524; *Somerset R. R. Co. v. Clarke*, 61 Id. 379.

11 Hann v. Mulberry etc. Gravel Road Co. 33 Ind. 103.

12 Curry v. Woodward, 53 Ala. 371. See *Robinson v. Bank of Darien*, 18 Ga. 65; *Farrar v. Walker*, 13 Bank. Reg. 82.

§ 118. Who liable to calls and assessments.—

Each person whose name appears upon the stock books of a corporation as a stockholder, is presumably the owner of the stock,¹ and so liable to calls and assessments.² And in an action to enforce the payment thereof, the burden of proof is upon him to show that he is not a stockholder.³ And a stockholder cannot avoid liability on the ground that he was not an original subscriber, but is an owner by purchase.⁴ A transferee of shares is liable for calls made after he has been accepted by the company as a stockholder, and his name has been registered on the stock books.⁵ And a buyer of shares, who induces the company, by false representations, to enter his name upon the register, is estopped to deny the validity of the

transfer so obtained, in an action against him for calls.⁶ And generally, a stockholder who participates or acquiesces in the action of corporate officers in making an assessment, is estopped from objecting that the assessment was unauthorized.⁷ Payment of installments by a subscriber, without objection, is a sufficient recognition of the legal existence of the corporation, to enable it to recover future installments.⁸

1 See *State v. Ferris*, 42 Conn. 590; *Mudgett v. Horrell*, 33 Cal. 25; *Spear v. Crawford*, 14 Wend. 20; *Corden v. Universal Gas Light Co.* 6 Dowl. & L. 373.

2 *Merrimac Min. Co. v. Bagley*, 14 Mich. 501; see also, *West Cornwall Railw. Co. v. Mowatt*, 15 Q. B. 521.

3 *Turnbull v. Payson*, 16 Bank. Reg. 440.

4 *Hartford etc. R. R. Co. v. Boorman*, 12 Conn. 530; *Merrimac Min. Co. v. Bagley*, 14 Mich. 501; *West Phila. Canal Co. v. Innes*, 3 Whart. 158; *Compton Shropshire etc. Canal Co. v. Anderson*, 6 Dowl. & L. 482; *Palmer v. Ridge Min. Co.* 34 Pa. St. 238.

5 *Webster v. Upton*, 91 U. S. 65; *Merrimac Min. Co. v. Levy*, 54 Pa. St. 227.

6 *Sheffield etc. Railw. Co. v. Woodcock*, 2 Eng. Railw. Cas. 522; and see *Everhart v. Westchester etc. R. R. Co.* 23 Pa. St. 339.

7 *Central R. R. Co. v. Johnson*, 30 N. H. 390; *Kansas City Hotel v. Harris*, 51 Mo. 444; *Macon etc. R. R. Co. v. Vason*, 57 Ga. 314; *Ossipee Manuf. Co. v. Canney*, 54 N. H. 275; and compare *Bavinton v. Pittsburgh etc. R. R. Co.* 34 Pa. St. 353; *Lexington etc. R. R. Co. v. Chandler*, 13 Met. 311; *Stratford etc. Railw. Co. v. Stratton*, 2 Barn. & Adol. 518.

8 *Maltby v. Northw. etc. R. R. Co.* 16 Md. 422. Compare *Cromford etc. Railw. Co. v. Lacey*, 3 Younge & J. 80; *London etc. Railw. Co. v. Graham*, 1 Q. B. 271; *Somerset etc. R. R. Co. v. Cushing*, 45 Me. 524; *Camp v. Byrne*, 41 Mo. 525.

§ 119. **Payment, how enforced.**—It is clear that, in the absence of any remedy provided by statute or by-law for the recovery of assessments, or unpaid installments, subscribers are liable therefor, in an action at law, though they have made no express promise.¹ And, according to the weight of authority, subscribers are so liable upon a promise, express or implied, notwithstanding a remedy by forfeiture of the stock is given to the corporation by the charter.² The penalty by forfeiture is cumulative, and affords no objection to an action at law.³ The corporation may waive it, and proceed *in personam* on the promise.⁴ But a subscriber cannot rescind his contract by forfeiting the payment made thereon;⁵ the option to for-

felt is with the company, and not with the stockholder.⁶ And if the company elect to forfeit and take back its stock, it cannot also collect the price subscribed.⁷ The power of a corporation to subject stock to forfeiture for non-payment of installments, must be expressly conferred,⁸ and is to be exercised strictly in accordance with the provisions of the charter,⁹ and the law of the state wherein the corporation exists.¹⁰ There can be no forfeiture for failure to pay assessments which are in whole or in part illegal.¹¹ And a general resolution forfeiting stock for non-payment of installments, which does not specify the stock forfeited, is not valid.¹² So, in a proper case, a redemption of shares may be obtained after a declaration of forfeiture and before sale.¹³ Where notice of assessments and calls is not required by the charter, it is not an indispensable requisite to liability in an action for stock subscriptions;¹⁴ and where the subscription paper fixes the time of payment, no demand before suit is necessary.¹⁵

1 Spangler v. Indiana etc. R. R. Co. 21 Ill. 276; Essex Bridge Co. v. Tuttle, 2 Vt. 393; Upton v. Tribilcock, 91 U. S. 43. See § 103, *ante*.

2 Conn. etc. R. R. Co. v. Bailey, 24 Vt. 465; Troy etc. R. R. Co. v. Kerr, 17 Barb. 381; Carlisle v. Cahawba etc. R. R. Co. 4 Ala. 70; Selma etc. R. R. Co. v. Upton, 5 Id. 737; Rockville etc. Turnp. Road v. Maxwell, 2 Cranch C. C. 451; Del. etc. Canal Co. v. Sanson, 1 Blinn. 70; Kirksey v. Florida etc. Plank Road Co. 7 Fla. 27; Troy Turnp. & R. R. Co. v. McChesney, 21 Wend. 26; Dayton v. Eorst, 31 N. Y. 445; Inlet v. Great North. Railw. Co. 1 Macq. 112. In Massachusetts, in the absence of an express promise to pay assessments, the remedy, in the first instance, is by a sale of the shares; Boston etc. R. R. Co. v. Wellington, 113 Mass. 70; City Hotel v. Dickinson, 6 Gray, 586; New Bedford etc. Turnp. Corp. v. Adams, 8 Mass. 138. So, in New Hampshire: N. H. Central R. R. v. Johnson, 30 N. H. 30; and see Piscataqua Ferry Co. v. Jones, 31 N. H. 491; White Mts. R. R. Co. v. Eastman, 34 Id. 124; see also Kennebec etc. R. R. Co. v. Kendall, 31 Me. 470; Kennebec etc. R. R. Co. v. Jarvis, 34 Id. 36.

3 South Bay etc. Dam Co. v. Gray, 30 Me. 547; Northern R. R. Co. v. Miller, 10 Barb. 260.

4 Eastern Plank Road Co. v. Vaughan, 20 Barb. 155; Spear v. Crawford, 14 Wend. 20; Mann v. Cooke, 20 Conn. 173; Instone v. Bridge Co. 2 Bibb. 577; Raymond v. Caton, 24 Ill. 123; City Hotel v. Dickinson, 6 Gray, 586; Birmingham etc. Railw. Co. 1 Q. B. 256. Compare Giles v. Hutt, 3 Ex. 18.

5 Klein v. Alton etc. R. R. Co. 13 Ill. 514; and see Conn. etc. R. R. Co. v. Bailey, 24 Vt. 465; Turnp. Co. v. Imlay, 1 South. 285.

6 Railroad Co. v. Rodriguez, 10 Rich. 278.

7 *Small v. Herkimer Manuf. Co.* 2 N. Y. 330; *Athol etc. R. R. Co. v. Inhabitants etc.* 110 Mass. 213; *Mechanics' Foundry etc. Co. v. Hall*, 121 Id. 272.

8 *Matter of Long Island R. R. Co.* 19 Wend. 37; *Downing v. Potts*, 23 N. J. L. 68; *Lewey's Island R. R. Co. v. Bolton*, 43 Me. 451; *Barton's Case*, 4 DeGex & J. 46; *Stanhope's Case*, Law R. 1 Ch. 161.

9 *Downing v. Potts*, 33 N. J. L. 66; *Eastern Plank Road Co. v. Vaughan*, 20 Barb. 155; *Clarke v. Hart*, 6 Ill. L. Cas. 634; and see *Garden Guiny etc. Min. Co. v. McLister*, Law R. 1 App. C. 33; *York etc. R. R. Co. v. Ritchie*, 40 Me. 425.

10 *Mitchell v. Vt. Copper Min. Co.* 8 Jones & S. 406; 67 N. Y. 280.

11 *Stoneham Branch R. R. Co. v. Gould*, 2 Gray, 277; *Lewey's Island R. R. Co. v. Bolton*, 43 Me. 451.

12 *Johnson v. Albany etc. R. R. Co.* 40 How. Pr. 193.

13 *Walker v. Ogden*, 1 Biss. 287; *Mitchell v. Vt. Copper Min. Co.* 8 Jones & S. 406; 67 N. Y. 280.

14 *Eppes v. Miss. etc. R. R. Co.* 35 Ala. 33. Compare *Grubb v. Mahoning Nav. Co.* 14 Pa. St. 302; *Grubbs v. Vicksburg etc. R. R. Co.* 50 Ala. 338; *Winter v. Muscogee R. R. Co.* 11 Ga. 433; *Lake Ontario etc. R. R. Co. v. Mason*, 16 N. Y. 451; *Italand etc. R. R. Co. v. Thrall*, 35 Vt. 636; *Cole v. Joliet Opera House Co.* 79 Ill. 93.

15 *New Albany etc. R. R. Co. v. Pickens*, 5 Ind. 247. Compare *Schenectady etc. R. R. Co. v. Thatcher*, 11 N. Y. 162; *Phenix Warh. Co. v. Badger*, 67 Id. 294; *Mansfield etc. R. R. Co. v. Hall*, 26 Ohio St. 310.

§ 120. Discharge of subscriber from liability.—

A change in the amount of the capital stock of a corporation, made without the assent or subsequent acquiescence of a subscriber, discharges him from all liability on his subscription.¹ So, of a change locating a road upon a different route;² or a change in the position of a bridge.³ And if a corporation embark in a new business, though by authority of law, stockholders not assenting thereto are absolved from liability on their subscriptions.⁴ So, if a charter becomes void by its terms, in consequence of the work not being commenced within the time fixed, the subscribers are discharged.⁵ And generally, changes in the contract of subscription after signing,⁶ or material alterations in the charter, or departure from the substantial features of the corporate organization as proposed to and accepted by the subscriber,⁷ or from its purposes and plans,⁸ if made without his consent, will operate to discharge him from liability on his subscription,⁹ or from an agreement to take and pay for bonds of the corporation.¹⁰ So, if the corporation release a part of its subscribers,

returning to them their money, subscribers not assenting thereto are discharged.¹¹ But mere changes in matters of detail, not affecting the material features of the engagement as intended and entered into by the subscriber,¹² or changes in the corporate affairs which may be considered authorized or contemplated by the charter and by-laws fairly construed,¹³ or changes to which the subscriber has assented¹⁴ even by implication,¹⁵ will not operate to discharge him.¹⁶ And so of changes which the directors or the majority have no power to make or carry into effect, because they are *ultra vires* or fraudulent.¹⁷ Nor will mere mismanagement discharge a subscriber;¹⁸ nor will abandonment of its business by a corporation discharge a subscriber, where it appears that the corporation is indebted to more than the amount of the subscription.¹⁹ A defense to an action against a subscriber upon his subscription, that he had not signed the articles of association, or authenticated his subscription in the commissioner's books, was disallowed as insufficient;²⁰ so, of a defense that the promoters of the company had purchased from themselves property for corporate use, at an exorbitant price, in fraud of the stockholders;²¹ or that the company had received subscriptions in excess of the amount authorized;²² or had received subscriptions without complying with a charter provision requiring the capital to be invested in public securities;²³ or that the commissioners, in receiving subscriptions, failed to exact a certain percentage in cash on each subscription when made as the charter required;²⁴ or that notice of an election of directors was insufficient;²⁵ or that the company had released other subscribers or forfeited their stock without payment;²⁶ or that the company's road had been seized by executive authority;²⁷ or that the company had not located its business at the place contemplated by the charter.²⁸

¹ *Hughes v. Antietam Manuf. Co.* 34 Md. 316. Compare *Ag. Br. R. R. Co. v. Winchester*, 13 Allen, 29.

2 Middlesex Turnp. Co. v. Swan, 10 Mass. 384; Rives v. Plank R. Co. 30 Ala. 92; Buffalo etc. R. R. Co. v. Pottier, 21 Barb. 21; Winter v. Muscogee R. R. Co. 11 Ga. 433. But compare Delaware R. R. Co. v. Thorp, 1 Monst. 14; Irwin v. Turnp. Co. 2 Pa. 466; Central Plank R. Co. v. Clemens, 16 Mo. 35; Rutland etc. R. R. Co. v. Thrall, 35 Vt. 536; Danbury etc. R. R. Co. v. Wilson, 22 Conn. 435.

3 Fremont Ferry etc. Co. v. Fuhrman, 8 Neb. 89; and see Hester v. Memphis etc. R. R. Co. 32 Miss. 378; Witter v. Miss. etc. R. R. Co. 20 Ark. 463.

4 Hartford etc. R. R. Co. v. Croswell, 5 Hill, 383; and compare Blatchford v. Ross, 54 Barb. 42.

5 Plank R. Co. v. Davidson, 39 Pa. St. 435. See Pickering v. Templeton, 2 Mo. App. 424; First Nat. Bank v. Hartford, 21 Iowa, 579; Four Mile Valley R. R. Co. v. Bailey, 13 Ohio St. 26d.

6 See Conn. etc. R. R. Co. v. Baxter, 32 Vt. 805; Spartanburg etc. R. R. Co. v. Graffenreid, 12 Rich. 675; Nugent v. Supervisors etc. 19 Wall. 241; Wawter v. Ohio etc. R. R. Co. 14 Ind. 174.

7 Sparrow v. Evansville etc. R. R. Co. 7 Ind. 369; Mannheim etc. Plank R. Co. v. Arndt, 31 Pa. St. 317; Supervisors etc. v. Miss. etc. R. R. Co. 21 Ill. 333; Kenosha etc. R. R. Co. v. Marsh, 17 Wis. 13; Clearwater v. Meredith, 1 Wall. 25; Black v. Del. etc. Canal Co. 9 C. E. Green, 455; Dorris v. Sweeney, 64 Barb. 636; 60 N. Y. 463; Marietta etc. R. R. Co. v. Elliott, 10 Ohio St. 57.

8 McCray v. Junction R. R. Co. 9 Ind. 358; Middlesex Turnp. Co. v. Locke, 8 Mass. 268.

9 Zabriskie v. Hackensack etc. R. R. Co. 3 C. E. Green, 178; Bery v. Marietta etc. Railw. Co. 26 Ohio St. 673; South Ga. etc. R. R. Co. v. Ayres, 53 Ga. 230.

10 New Jersey etc. R. R. Co. v. Strait, 35 N. J. L. 323.

11 McCully v. Pittsburgh etc. R. R. Co. 32 Pa. St. 225.

12 See Rice v. Rock Island etc. R. R. Co. 21 Ill. 93; Agr. Br. R. R. Co. v. Winchester, 13 Allen, 29; Everhart v. West Chester etc. R. R. Co. 28 Pa. St. 33; New Haven etc. R. R. Co. v. Chapman, 38 Conn. 56; Poughkeepsie etc. Plank R. Co. v. Griffin, 24 N. Y. 159; Pacific R. R. Co. v. Hughes, 223 Mo. 91; Midland etc. Railw. Co. v. Gordon, 16 Mea. & W. 84; and see Witter v. Miss. etc. R. R. Co. 20 Ark. 463.

13 Mowrey v. Indianapolis etc. R. R. Co. 4 Biss. 78; Fry v. Lexington etc. R. R. Co. 2 Met. 314; Bish v. Johnson, 21 Ind. 299; Ill. River R. R. Co. v. Beers, 27 Ill. 185; Ottawa etc. R. R. Co. v. Black, 79 Id. 262; and Northern R. R. Co. v. Miller, 10 Barb. 230; South Bay Meadow Dam Co. v. Gray, 30 Me. 647; Cork etc. Railw. Co. v. Patterson, 18 Conn. R. 414.

14 Clarke v. Monongahela Nav. Co. 10 Watts, 364; Doane v. Treasurer etc. Wright, 752.

15 Memphis Br. R. R. Co. v. Sullivan, 57 Ga. 240.

16 See Nugent v. Supervisors etc. 19 Wall. 241; Hays v. Ottawa etc. R. R. Co. 61 Ill. 422.

17 Railroad Co. v. Gaster, 24 Ark. 87; Hays v. Ottawa etc. R. R. Co. 61 Ill. 422; and see Miss. etc. R. R. Co. v. Cross, 20 Ark. 443; Smith v. Tallahassee Branch etc. 30 Ala. 650.

18 Chetlain v. Republic Life Ins. Co. 86 Ill. 220.

19 Phoenix Warehousing Co. v. Badger, 67 N. Y. 294. Compare McMillan v. Maysville etc. R. R. Co. 15 B. Mon. 218; Ill. etc. R. R. Co. v. Cook, 29 Ill. 237.

20 Peninsula Railw. Co. v. Duncan, 28 Mich. 130.

21 Dorris v. French, 4 Hun. 292; 6 Thomp. & C. 581.

23 *Oler v. Balt. etc. R. R. Co.* 41 Md. 583.

22 *Little v. O'Brien*, 9 Mass. 423; and see *Hannibal etc. Plank R. Co. v. Menefee*, 25 Mo. 547; *Straus v. Eagle Ins. Co.* 5 Ohio St. 59; *First Municipality v. New Orleans Theater Co.* 2 Rob. (La.) 206.

24 *Blair v. Rutherford*, 31 Tex. 465; *Garrett v. Dillsbury etc. R. R. Co.* 78 Pa. St. 465; and see *Straus v. Eagle Ins. Co.* 5 Ohio St. 59.

25 *Central Plank R. Co. v. Clemens*, 16 Mo. 359; *Eastern Plank R. Co. v. Vaughan*, 14 N. Y. 546.

26 *Dorman v. Jacksonville etc. Plank R. Co.* 7 Fla. 265; and see *Memphis Br. R. R. Co. v. Sullivan*, 27 Ga. 240.

27 *Mullins v. Railroad Co.* 54 Ga. 580.

28 *Courtright v. Deeds*, 37 Iowa, 503.

§ 121. *Assent, estoppel, etc.*—If a subscriber assent to a material change in the corporate affairs, even by implication, as by paying assessments with knowledge of the change,¹ he cannot be relieved from the payment of his subscription by reason of such change.² So, it is an established rule that, in the absence of fraud,³ a party recognizing the existence of a corporation by subscribing for its stock cannot defend an action on his subscription by impeaching the existence and capacity of the corporation.⁴ As long as defects in organization or subsequent abuse of the corporate powers are tolerated by the state, it is not for individual subscribers to call them in question.⁵ And a transferee of shares is estopped from disputing the validity of a subscription upon any grounds that could not have been taken by the original subscriber.⁶ The admission by a party that he is a subscriber to the stock of a company, upon the faith of which others are induced to act for his benefit, will estop him from afterward denying that he did in fact subscribe.⁷

1 *Memphis Br. R. R. Co. v. Sullivan*, 27 Ga. 240.

2 *Memphis Br. R. R. Co. v. Sullivan*, 27 Ga. 240; *Doane v. Treasurer etc. Wright (Ohio)*, 752; *Kennebec etc. R. R. Co. v. Pahner*, 34 Me. 364.

3 See *Duchess Cotton Manuf. v. Davis*, 14 Johns. 238; *Stoops v. Greenburg etc. Plank R. Co.* 10 Ind. 47; *Upton v. Tribilcock*, 91 U. S. 45.

4 *Meth. Epis. Union Church v. Pickett*, 19 N. Y. 482; *Montpeller etc. R. R. Co. v. Langdon*, 46 Vt. 284; *Parker v. Northern R. R. Co.* 33 Mich. 23; and see *Shober v. Lancaster County etc. Assoc.* 68 Pa. St. 423. Compare *First Baptist Soc. v. Kapalee*, 16 Wend. 605; *Oldtown etc. R. R. Co. v. Veazie*, 39 Me. 571.

5 *Meth. Epis. Union Church v. Pickett*, 19 N. Y. 482; *Dorris v. French*, 4 Hun. 292; 6 Thomp. & C. 581; *Hanover Junction etc. R. R.*

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Co. v. Grubb, 82 Pa. St. 36; St. Charles Manuf. Co. v. Briton, 2 Mo. App. 290; Monroe v. Fort Wayne etc. R. R. Co. 28 Mich. 272.

6 Palmer v. Lawrence, 3 Sand. 161.

7 Graff v. Pittsburgh etc. R. R. Co. 31 Pa. St. 489; and compare New Albany R. R. Co. v. Slaughter, 10 Ind. 218; Litchfield Bank v. Church, 29 Conn. 137.

§ 122. **Transfer of shares.**—The right of transfer is incidental to the ownership of shares in the stock of joint-stock companies and corporations, formed in pursuance of legislative authority;¹ and a by-law which unreasonably interferes with the free exercise of this right is void, as being in restraint of trade.² Even where a state owns shares, it may sell or otherwise dispose of its interests therein, and such transfer does not dissolve the corporation.³ But corporations are trustees for the property and title of each owner of their stock,⁴ and may, as a matter of right, and for their own safety, demand evidence of authority to transfer stock before permitting it to be made.⁵ But as to all persons except the corporation,⁶ or subsequent purchasers in good faith, without notice,⁷ the sale of shares is complete, and the buyer's title is perfect, when the seller has subscribed the proper authority to the transfer agents to make a transfer on the books, and has delivered this with the old certificate to the buyer, and the latter has paid the price.⁸ And this is so, although the general law declares that no transfer shall be valid for any purpose whatever, unless it be entered in the book prescribed, and in accordance with the law.⁹ Stock certificates are neither in form nor character negotiable paper, and so transferable by mere indorsement and delivery;¹⁰ but they approximate to such paper as nearly as practicable, and are construed in a way to invite the confidence of business men, so that they are sold in open market the same as other securities.¹¹ A sale of stock, as between buyer and seller, confers upon the former the right to demand a legal transfer of the shares in the company's books;¹² and for refusing to make such transfer, the company renders itself liable to

an action at law, as for a conversion of the stock;¹ in which action the measure of damages is the market value of the stock at the time of demand and refusal to transfer,¹⁴ with any dividends which had accrued thereon at that time, together with interest to the trial.¹⁵ A demand made upon any officer having charge of the books for the purpose is good.¹⁶ And a refusal to make the transfer cannot be justified on the ground that, in the judgment of the transfer agents, the motives and purposes of the parties are improper, or the transfer may affect injuriously the interests of the company.¹⁷ If the requisite number of shares are transferred, though without regard to the identity of those claimed, it is sufficient.¹⁸ A gift of stock in view of death, made by a simple delivery of the certificates, with the intent to transfer the stock, is valid.¹⁹ So, an unconditional bequest of the dividends of stock is a bequest of the stock itself.²⁰ Letters of administration are sufficient evidence of authority to execute transfers of stock.²¹ Formal requisites to a transfer prescribed in the charter or by-laws, being for the benefit of the company, may be waived;²² and where the company permits transfers to be made in a manner different from that directed, it cannot afterward repudiate the rights of the transferees as stockholders, on the ground that the prescribed formalities were disregarded.²³ If an equitable owner of shares demand a transfer, without offering to surrender the certificates, and they are known to the company to be in the possession of another person claiming to be the owner, a refusal to transfer will be sustained.²⁴ So, where a transfer is made to a purchaser at sheriff's sale, after the levy of an attachment and notice to the company, but before demand by a prior assignee for a transfer to him, the company is protected.²⁵

1 *State v. Franklin Bank*, 10 Ohio, 91; *Brightwell v. Mallory*, 10 Yerg. 196; *Duvergier v. Fellows*, 5 Bing. 248; *Gibbert's Case*, Law R. 5 Ch. 559.

2 *Quiner v. Marblehead Ins. Co.* 10 Mass. 476; *Sargent v. Franklin Ins. Co.* 8 Pick. 90; *Moore v. Bank of Commerce*, 52 Mo. 377.

3 *La Grange etc. R. R. Co. v. Rainey*, 7 Cold. 420.

4 See *Lowry v. Commercial Bank*, Taney, 310; *Fisher v. Brown*, 104 Mass. 289; *Magwood v. Railroad Bank*, 10 So. Car. 379; *Duncan v. Jaudon*, 15 Wall. 165; *Brewster v. Syme*, 42 Cal. 139.

5 *Chew v. Bank of Baltimore*, 14 Md. 299; *Bayard v. Farmers' etc. Bank*, 54 Pa. St. 232; N. Y. etc. R. R. Co. v. *Schuyler*, 34 N. Y. 30.

6 See *Bank of Commerce's App.* 73 Pa. St. 59; *Grymes v. Hone*, 49 N. Y. 17; *Ross v. Southwestern R. R. Co.* 53 Ga. 514; *Brown v. Adams*, 5 Diss. 181.

7 See *Naglee v. Pacific Wharf Co.* 20 Cal. 529; *Parrott v. Byers*, 40 Id. 614; *Mt. Holly etc. Turnp. Co. v. Ferree*, 17 N. J. Eq. 117; *Holbrook v. N. J. Zinc Co.* 57 N. Y. 616; *Smith v. Crescent City*, 30 La. An. 1378.

8 *Newberry v. Detroit etc. Manuf. Co.* 17 Mich. 141; *Bruce v. Smith*, 44 Ind. 1; *Leitch v. Wells*, 48 N. Y. 585; *Bridgeport Bank v. N. Y. etc. R. R. Co.* 30 Conn. 231; *Howe v. Starkweather*, 17 Mass. 243; *Loring v. Salisbury Mills*, 125 Id. 138; *Scripture v. Frankestown Soapstone Co.* 50 N. H. 571; *Ross v. Southwestern R. R. Co.* 53 Ga. 514; *Smith v. American Coal Co.* 7 Lana. 317; *Bank of America v. McNeill*, 10 Bush. 54.

9 *Johnson v. Underhill*, 83 N. Y. 203; *Parrott v. Byers*, 40 Cal. 614; *Duke v. Cahawba Nav. Co.* 10 Ala. 82; *Farmers' Bank v. Iglehart*, 6 Gill. 50. Compare *Pinkerton v. Manchester etc. R. R. Co.* 42 N. H. 424; *Northrop v. Curtis*, 5 Conn. 246; N. Y. etc. R. R. Co. v. *Schuyler*, 38 Barb. 534; *Reg. v. General Cemetery Co.* 6 El. & B. 415.

10 *Dunn v. Com. Bank of Buffalo*, 11 Barb. 580; *Weaver v. Barden*, 3 Lana. 338; 49 N. Y. 236; *Hall v. Rose Hill etc. Road Co.* 70 Ill. 673; *Shaw v. Spencer*, 100 Mass. 382; 1 Am. R. 115.

11 *Bank v. Lanier*, 11 Wall. 369; and see *Stinson v. Thornton*, 56 Ga. 377; *Webster v. Upton*, 91 U. S. 65; *First Nat. Bank v. Gifford*, 47 Iowa, 375; *Lee v. Citizens' Nat. Bank*, 2 Cin. 238.

12 *Purchase v. N. Y. Ex. Bank*, 3 Robt. 164; *People v. Crockett*, 9 Cal. 112; *Webster v. Upton*, 91 U. S. 65.

13 *Bank of America v. McNeill*, 10 Bush. 54; *Kimball v. Union Water Co.* 44 Cal. 173; 13 Am. R. 157; and see *Commercial Bank v. Kortright*, 22 Wend. 348; *Gray v. Portland Bank*, 3 Mass. 364; *State v. Bombauer*, 46 Mo. 153; *Murray v. Stevens*, 110 Mass. 95; *Hill v. Pine River Bank*, 45 N. H. 390; *People v. Parker Vein Coal Co.* 1 Abb. Pr. 123; 10 How. Pr. 543; *Reg. v. Liverpool, etc. Railw. Co.* 11 Eng. L. & Eq. 408. An equitable action will lie to compel a transfer; *Cushman v. Thayer Manuf. Co.* 76 N. Y. 335; 7 Duly, 390; 32 Am. R. 315.

14 See *McNeill v. Tenth Nat. Bank*, 55 Barb. 59; 46 N. Y. 325; *Douglas v. Merceles*, 25 N. J. Eq. 144; *Bulld. etc. Assoc. v. Sendmeyer*, 50 Pa. St. 67; *Rex v. London Assurance Co.* 5 Barn. & Ald. 699.

15 *Baltimore etc. Railw. Co. v. Sewell*, 35 Md. 238; 6 Am. R. 402; and see *Hussey v. Manuf. & Mech. Bank*, 10 Pick. 418; *North Am. Bulld. Assoc. v. Sutton*, 35 Pa. St. 463.

16 *Turnp. Co. v. Bulla*, 45 Ind. 1. See *Williams v. Mechanics' Bank*, 5 Blatchf. 59.

17 *State v. McIver*, 2 So. Car. 25; and see *Helm v. Swiggett*, 12 Ind. 194; *State v. Smith*, 48 Vt. 266. Compare *Re Smith*, Law R. 6 Eq. 238.

18 *Hardenbergh v. Bacon*, 33 Cal. 356; *Ross v. Union Pacific Railw.* 1 Woolw. 26; *Noyes v. Spaulding*, 27 Vt. 420.

19 *Walsh v. Sexton*, 55 Barb. 251; and see *Westerlo v. De Witt*, 36 N. Y. 340.

20 *Collier v. Collier*, 3 Ohio St. 369.

21 *Bayard v. Farmers' etc. Bank*, 53 Pa. St. 232. Compare *Alfonso's Appeal*, 70 Id. 347.

22 *Chambersburg Ins. Co. v. Smith*, 11 Pa. St. 120; *Smock v. Henderson*, 1 Wils. (Ind.) 241; *Chouteau Spring Co. v. Harris*, 30 Mo. 382.

23 *Bargate v. Shortridge*, 5 H. L. Cas. 297; *Ellison v. Schneider*, 25 La. An. 436.

24 *Nat. Bank v. Lake Shore etc. Railw. Co.* 21 Ohio St. 221. See *Sprague v. Cocheco Manuf. Co.* 10 Blatchf. 173.

25 *Williams v. Mechanics' Bank*, 5 Blatchf. 59. But compare *De Comeau v. Guild Farm Oil Co.* 3 Daly, 218; *State v. Warren Foundry etc.* 32 N. J. L. 439.

§ 123. **Effect and incidents of transfers.**—The transferee of stock is substituted to the rights and obligations of the original subscriber,¹ and is liable for installments called for after the transfer.² A contract to buy shares, induced by fraudulent misrepresentations, is voidable at the election of the buyer;³ and a buyer of shares illegally issued may rescind his contract, and recover back the price paid from the vendor, if the latter took part in the illegal transaction.⁴ If stock is sold without disclosing to the buyer that it is subject to a tax, the seller is liable to the buyer for the sum paid to discharge the tax.⁵ Hypothecated shares of stock in the hands of the transferee subjects him to all the liabilities of ordinary owners.⁶ Where the holder of stock assigns his interest therein after the corporation is dissolved, the assignee takes no greater interest than had the assignor;⁷ and a purchaser under an attachment sale takes the same title that the judgment debtor had to the shares when the attachment was levied.⁸ A transfer which operates to relieve a stockholder from liability for his subscription, by the substitution of another person to the prejudice of creditors, will not be allowed.⁹ And since it is the duty of a corporation to protect the owners of shares from unauthorized transfers,¹⁰ it may be held liable in damages for any loss sustained through the negligence or misconduct of its officers in making transfers.¹¹ In an action for inducing the plaintiff, by fraudulent means and representations, to purchase stock which the defendant knew to be worthless, the measure of damages is the difference in the value of the stock as the condition of the company issuing it really was, and its value as the purchaser was fraudulently induced to believe it was.¹²

1 *Mann v. Currie*, 2 Barb. 294; and see *Bayard v. Farmers' etc. Bank*, 52 Pa. St. 232; *Sabine v. Bank of Woodstock*, 21 Vt. 353; *McCready v. Rumsey*, 6 Duer, 574.

2 *Hall v. U. S. Ins. Co.* 5 Gill, 484. See also *Brigham v. Mead*, 10 Allen, 245.

3 *Upton v. Englehart*, 3 Dill. 496; *Upton v. Tribilcock*, 91 U. S. 45; *Seaman v. Low*, 4 Bosw. 337.

4 *Vosdick v. Sturges*, 1 Biss. 255.

5 *Simmons v. Aldrich*, 41 Wis. 241.

6 *Wheelock v. Kost*, 77 Ill. 296.

7 *James v. Woodruff*, 10 Paige, 541; 2 Denio, 574; and see *Callanan v. Edwards*, 32 N. Y. 483.

8 *Geyer v. Western Ins. Co.* 3 Pittsb. 41.

9 Re *Bachman*, 12 Bank. R. 223. Compare *Hughes v. Antietam Manuf. Co.* 34 Md. 316; *Isham v. Buckingham*, 47 N. Y. 216; *Finkel v. Joliet Opera House Co.* 79 Ill. 334; *Bowden v. Santos*, 1 Hughes, 156.

10 *Bayard v. Farmers' etc. Bank*, 52 Pa. St. 232; *Magwood v. Railroad Bank*, 5 So. Car. 379.

11 *Bank v. Lanier*, 11 Wall. 369.

12 *Hubbell v. Meigs*, 50 N. Y. 480. Compare *Douglas v. Merceles*, 25 N. J. Eq. 144.

§ 124. **Lien of the corporation on stock.**—There is no lien upon stock at common law in favor of the corporation for the indebtedness of the stockholders;¹ and the general power to enact by-laws does not embrace that of creating such liens.² When, therefore, such a lien does exist, it is by virtue of authority, either expressed in the act of incorporation, or by by-laws made by authority of the act.³ A power to abridge the right of transfer will not be inferred from a statutory provision, unless it cannot otherwise have efficacy, and unless it present so strong a probability of intention that the contrary cannot be supposed.⁴ But a stockholder may be bound by a usage, known to him, not to permit a transfer of the stock of one indebted to the corporation.⁵ And where a provision of the charter authorizes the directors to make rules and regulations as to the transfer of stock,⁶ a by-law forbidding the transfer, where the stockholder is indebted to the corporation, may be valid, although it be inconsistent with the general law of the state governing the transfer of property.⁷ Where the corporation has a valid lien against the stock for a debt of the holder, a transferee of

the certificate is not entitled to a transfer of the stock on the company's books, except on terms of his satisfying the lien.⁸ The indebtedness of a stockholder, which entitles the corporation to a lien on his stock, includes notes discounted by a bank for the stockholder,⁹ as well as debts due for an original subscription;¹⁰ also debts to become due, as well as those due;¹¹ and also those in which the stockholder is liable, as surety or indorser, as well as those in which he is liable as principal.¹² So, a lien upon "shares and stock" extends to dividends;¹³ and to a debt due from two stockholders in partnership, as well as to debts which each owes in severalty;¹⁴ but not to dividends accruing after the death of the shareholder.¹⁵ The whole of the debtor's stock may be held under a valid lien, till the debt is paid, though the debt be less than the value of the stock;¹⁶ and although the bank takes security from one of the parties to a bill or note discounted by it, it may also hold the shares of another party as security for the same.¹⁷ In order to put a corporation in the wrong for refusing to transfer, where it claims more than is due, the stockholder must tender what he admits to be due.¹⁸ Stock standing on the books of the company in the name of a fictitious person is liable for the debt of the true owner.¹⁹

1 See *Utica Bank v. Smalley*, 2 Cowen, 770; 14 Am. Dec. 526; *Hearst v. State Bank*, 2 Dev. Eq. 111; *Farmers' etc. Bank v. Wasson*, 48 Iowa, 236; 30 Am. R. 398; *Massachusetts Iron Co. v. Hooper*, 7 Cush. 183; *Weston's Case*, Law R. 4 Ch. 20; *People v. Crockett*, 9 Cal. 112.

2 *Conklin v. Second Nat. Bank*, 53 Barb. 512; 45 N. Y. 655; *Driscoll v. West Bradley etc. Manuf. Co.* 59 N. Y. 56; *Bullard v. Bank*, 18 Wall. 569; *Evansville Nat. Bank v. Metrop. Nat. Bank*, 2 Biss. 627. But compare *Lockwood v. Mech. Nat. Bank*, 9 Ill. 1. 308; *Fendergast v. Bank of Brooklyn*, 2 Sawy. 108; *McDowell v. Bank of Wilmington*, 1 Harr. 27; *Vansands v. Middlesex County Bank*, 26 Conn. 144; *Tuttle v. Walton*, 1 Ga. 43.

3 *Grant v. Mech. Bank*, 15 Serg. & R. 140; *Union Bank v. Laird*, 2 Wheat. 39; *Steamship Dock Co. v. Heron*, 52 Pa. St. 280; *Hubbertsty v. Manchester Railw. Co.* Law R. 2 Q. B. 471.

4 *Driscoll v. West Bradley etc. Manuf. Co.* 59 N. Y. 96.

5 *Morgan v. Bank of North America*, 8 Serg. & R. 73; 11 Am. Dec. 575.

6 See *St. Louis etc. Ins. Co.* 9 Mo. 149; *Cunningham v. Alabama etc. Trust Co.* 4 Ala. 662.

- 7 *Mechanics' Bank v. Merchants' Bank*, 45 Mo. 513.
- 8 *McCready v. Rumsey*, 6 Duer, 574; *Reese v. Bank of Commerce*, 14 Md. 271; and see *Mech. Bank v. N. Y. etc. B. R. Co.* 13 N. Y. 699; *West Branch Bank v. Armstrong*, 40 Pa. St. 278.
- 9 *Rogers v. Huntington Bank*, 12 Serg. & R. 77.
- 10 *Morgan v. Bank of North America*, 8 Serg. & R. 73; 11 Am. Dec. 575; *Pittsburgh etc. B. R. Co. v. Clarke*, 29 Pa. St. 146.
- 11 *Grant v. Mech. Bank etc.* 15 Serg. & R. 140; *Downer v. Bank of Zanesville*, Wright, 477; *Leggett v. Bank of Sing Sing*, 24 N. Y. 283. Compare *Re Stockton etc. Iron Co.* Law R. 2 Ch. Div. 101.
- 12 *St. Louis etc. Ins. Co. v. Goodfellow*, 9 Mo. 149; *McDowell v. Bank of Wilmington*, 1 Har. (Del.) 27.
- 13 *Hague v. Dandeson*, 2 Ex. 741.
- 14 *German Security Bank v. Jefferson*, 19 Bush, 326; *Matter of Bigelow*, 3 Ben. 469; *Geyer v. West Ins. Co.* 3 Pittsb. (Pa.) 41. Compare *Arnold v. Suffolk Bank*, 27 Barb. 424.
- 15 *Brent v. Bank of Washington*, 2 Cranch C. C. 517.
- 16 *Sewall v. Lancaster Bank*, 17 Serg. & R. 285.
- 17 *Union Bank v. Laird*, 2 Wheat. 390; and see *McLean v. Lafayette Bank*, 3 McLean, 567.
- 18 *Pierson v. Bank of Washington*, 3 Cranch C. C. 363.
- 19 *Stebbins v. Phoenix Fire Ins. Co.* 3 Paige, 350.

§ 125. Profits and dividends.—"Profits" or "net earnings" are, properly, the gross receipts less the expense of carrying on the business of the corporation to earn such receipts,¹ not including interest on money borrowed;² or the term "profits" may denote what remains after defraying every expense, including loans falling due, as well as the interest on such loans.³ The term "dividend," when applied to something to be paid by corporations not insolvent,⁴ or in contemplation of dissolution, means a sum which the corporation sets apart from its profits to be divided among its members.⁵ When all liabilities are paid, either out of the gross receipts or out of the net earnings, the remainder is the profit of the shareholders, to go toward dividends.⁶ The guaranty of a dividend is nothing more than a pledge of the funds legally applicable to the purposes of a dividend;⁷ and agreements to pay interest or dividends on the capital stock, without reference to the ability to pay from the earnings of the company, are opposed to public policy and void.⁸ Ownership of stock is essential to a recovery

of dividends;⁹ and a stockholder has no legal title to the property or profits of the corporation until a dividend is actually declared;¹⁰ and dividends cannot be sued for until after a demand of payment.¹¹ A purchaser of shares takes with them the right to receive all future dividends declared on such shares.¹² Generally, the directors are the sole judges of what portion of the profits they ought from time to time to divide, and when to make such division;¹³ but they are bound to make the dividend equal and just among all who are interested,¹⁴ and it must be general on all the stock.¹⁵ Equity will interfere to prevent an unjust discrimination in the distribution of profits;¹⁶ and acceptance of a dividend by a stockholder is no ratification of the illegal conduct of the directors.¹⁷ Dividends improperly declared and paid, before payment of the corporate debts, may be recovered back;¹⁸ creditors of the corporation being entitled to priority of payment over its stockholders.¹⁹ If a dividend be paid to a person not authorized to receive it, the company may be compelled to pay it again to the true owner.²⁰ It is the English rule, that dividends must be paid in money;²¹ but in the United States, stock, or scrip dividends, are common.²² And generally, where the company has earned a dividend, the directors may elect to retain the moneys so earned for proper corporate purposes, and in lieu thereof issue to stockholders a corresponding amount of stock.²³ But dividends cannot be applied by the directors to purposes not included in the charter or fundamental contract, without the consent of the stockholders.²⁴ And the courts will not presume that an increase of stock authorized by law is a stock dividend.²⁵ Interest will not accrue upon dividends, nor will the statute of limitations begin to run, until demand is made.²⁶ And a letter of mere inquiry is not a sufficient demand to sustain an action for dividends.²⁷ So, a corporation may retain a cash dividend in pledge for a debt due it from a shareholder;²⁸ and a demand made while the lien con-

tinues is premature and insufficient.²⁹ The right to recover a dividend is individual, and each shareholder must bring his own special action.³⁰

1 See *People v. Supervisors of Niagara*, 4 Hill, 20; *St. John v. Erie Railw. Co.* 10 Blatchf. 271; 22 Wall. 138.

2 *Corry v. Londonderry etc. Railw. Co.* 29 Beav. 263. Compare *Barnard v. Vt. etc. R. R. Co.* 7 Allen, 512; *Heard v. Eldridge*, 109 Mass. 253; *Richardson v. Vt. etc. R. R. Co.* 44 Vt. 613; *Chase v. Vanderbilt*, 5 Jones & S. 334; 62 N. Y. 307; *Bardwell v. Sheffield Water Works Co.* Law R. 14 Eq. 517.

3 See *Corry v. Londonderry etc. Railw. Co.* 29 Beav. 263; *Curry v. Woodward*, 44 Ala. 305; *Karnes v. Rochester etc. R. R. Co.* 4 Abb. Pr. N. S. 107; *People v. Comm'rs, etc.* 35 N. Y. 423, 441; *Queen v. Arnaud*, 9 Ad. & E. (N. S.) 806.

4 See *Scott v. Eagle Ins. Co.* 7 Paige, 196; *Karnes v. Rochester etc. R. R. Co.* 4 Abb. Pr. N. S. 107.

5 *Lockhart v. Van Alstyne*, 31 Mich. 76.

6 *St. John v. Erie Railw. Co.* 10 Blatchf. 271; 22 Wall. 138.

7 *Taft v. Hartford etc. R. R. Co.* 8 R. I. 310. See § 115, *ante*.

8 *Macdougall v. Jersey Imp. Hotel Co.* 2 Hem. & M. 523; *Pittsburg etc. R. R. Co.* 63 Pa. St. 126; *Lockhart v. Van Alstyne*, 31 Mich. 76. Compare *Ohio v. Cleveland etc. R. R. Co.* 6 Ohio St. 489; *Cunningham v. Vt. etc. R. R. Co.* 12 Gray, 411; *Evansville R. R. Co. v. Evansville*, 15 Ind. 395; *Martin v. Zellerbach*, 38 Cal. 300.

9 *Dow v. Gould etc. Min. Co.* 31 Cal. 629; *Brundage v. Brundage*, 65 Barb. 397; *Gifford v. Thompson*, 115 Mass. 478; *Central R. R. Co. v. Papot*, 59 Ga. 342. Compare *Brewster v. Lathrop*, 15 Cal. 21; *Hill v. Newichawanick Co.* 8 Hun, 459; 48 How. Pr. 427; 71 N. Y. 493; *Burroughs v. No. Car. R. R. Co.* 67 No. Car. 376.

10 *Jones v. Terre Haute etc. R. R. Co.* 57 N. Y. 196; *Minot v. Payne*, 99 Mass. 101; *Goodwin v. Hardy*, 57 Me. 143; *Curry v. Woodward*, 44 Ala. 305; *Dalton v. Midland Railw. Co.* 13 Com. B. 474; *Tawcet v. Laurie*, 1 Drew & S. 192.

11 *Jackson v. Plank Road Co.* 31 N. J. L. 277; *Stoddard v. Shetucket etc. Co.* 34 Conn. 542; *Keppell v. Petersburg R. R. Co.* Chase's Dec. 167.

12 *March v. Eastern R. R. Co.* 43 N. H. 515. Compare *Hill v. Newichawanick Co.* 8 Hun, 459; 48 How. Pr. 427.

13 *Luling v. Atlantic Ins. Co.* 45 Barb. 510; *Karnes v. Rochester etc. R. R. Co.* 4 Abb. Pr. N. S. 107; *State of Louisiana v. Bank of La.* 6 La. 745; *Jackson v. Newark Plank R. Co.* 31 N. J. L. 277. Compare *Rex v. Bank of England*, 2 Barn. & Ald. 620; *Brown v. Monmouthshire Railw. etc. Co.* 4 Eng. L. & Eq. 118; *Webb v. Earle*, Law R. 20 Eq. 556.

14 *Jones v. Terre Haute etc. R. R. Co.* 57 N. Y. 196; *State v. Balt. etc. R. R. Co.* 6 Gill. 363; *Hoole v. Great West. Railw. Co.* Law R. 3 Ch. 262.

15 *Ryder v. Alton etc. R. R. Co.* 13 Ill. 516; *Atlantic etc. Tel. Co. v. Commonw.* 3 Brewst. (Pa.) 366.

16 *Luling v. Atlantic Mut. Ins. Co.* 45 Barb. 510; 30 How. Pr. 69; *Coe v. Belfast etc. Railw. Co.* Law R. 2 Ch. (Ir.) 112; and see *Rance's Case*, Law R. 6 Ch. 104; *Bloxam v. Metrop. Railw. Co.* Law R. 3 Ch. 337; *Howell v. Chicago etc. R. R. Co.* 51 Barb. 378; *Smith v. Prattville Co.* 29 Ala. 503.

17 *Hilles v. Parish*, 14 N. J. Eq. 330.

18 *Curran v. State*, 15 How. 304; *Bartlett v. Drew*, 57 N. Y. 587; *Hast-*

ings v. Drew, 76 *Id.* 9; and see *Rance's Case*, *Law R.* 6 Ch. 104; *Evans v. Coventry*, 8 *DeGex M. & G.* 835.

19 *Bartlett v. Drew*, 57 *N. Y.* 537. See *Griffith v. Mangam*, 73 *N. Y.* 611; *Lowene v. Am. Fire Ins. Co.* 6 *Palge*, 482.

20 *St. Romes v. Levee Steam Cotton Press*, 20 *La. An.* 381; and see *Davis v. Bank of England*, 2 *Bing.* 393.

21 *Hoole v. Great West. Railw. Co.* *Law R.* 3 Ch. 262.

22 See *State v. Balt. etc. R. R. Co.* 6 *Gill*, 363; *Earp's Appeal*, 23 *Pa. St.* 368.

23 *Howell v. Chicago etc. R. R. Co.* 51 *Barb.* 378; *Rand v. Hubbell*, 115 *Mass.* 461; *Citizen's etc. Ins. Co. v. Lott*, 45 *Ala.* 185; *Minot v. Paine*, 89 *Mass.* 101; *Wiltbank's Appeal*, 64 *Pa. St.* 256. Compare *Lord v. Brooks*, 82 *N. H.* 72; *Moss' Appeal*, 83 *Pa. St.* 264; *Parker v. Mason*, 8 *R. I.* 427.

24 *March v. Eastern R. R. Co.* 43 *N. H.* 515.

25 *Commonw. v. Erie etc. R. R. Co.* 74 *Pa. St.* 94.

26 *Phila. etc. R. R. Co. v. Hickman*, 23 *Pa. St.* 329; *State v. Balt. etc. R. R. Co.* 6 *Gill*, 363.

27 *Scott v. Central R. R. etc. Co.* 52 *Barb.* 45.

28 *Bates v. New York Ins. Co.* 3 *Johns. Cas.* 238; *Sargent v. Franklin Ins. Co.* 8 *Pick.* 90. Compare *Att-Gen. v. State Bank*, 1 *Dev. & B.* 545.

29 *Hagar v. Union Nat. Bank*, 63 *Me.* 509.

30 *Morgan v. Great Eastern Railw. Co.* 1 *Hem. & M.* 560; *Carlisle v. South-Eastern Railw. Co.* 2 *Hall & T.* 366.

§ 126. Individual liability of stockholders.—The individual liability of stockholders for the corporate debts, depends solely on provisions of positive law;¹ and if the charter or some statute does not impose such liability, it cannot be imposed by a corporate by-law.² And representations made to the public by members of the corporation that they were individually liable, will not make them so, even in equity.³ But although, in general, members of private corporations are not individually liable, yet *quasi* corporations, such as towns, etc., in New England, are, by immemorial usage, an exception;⁴ and the inhabitants are individually liable on a judgment and execution against the town or other *quasi* corporation.⁵ A general statute imposing a personal liability upon stockholders, for the corporate debts, is not considered to impose it as a penalty, but by way of recognizing an obligation arising upon contract.⁶ And where the liability is imposed upon the stockholders in general terms, and in proportion to the amount of their stock, their liability must be treated as several, and they must be sued severally.⁷ For the ordinary pur-

poses of an action on such liability, a judgment recovered against the corporation for a debt, establishes the corporate indebtedness;⁸ unless it be shown that the judgment was procured through collusion or fraud.⁹ If a special statutory remedy is provided for the enforcement of individual liability, it is exclusive of all others, legal and equitable, and must be pursued.¹⁰ In order to charge a stockholder under a statute imposing individual liability, he must come within the description given in the statute of the persons chargeable.¹¹ But the word "subscriber" was construed to include stockholders of every description.¹² The fact that the defendant's name appears on the stock-book as a stockholder, is presumptive evidence that he is so.¹³ Paying an installment, and voting at an election of officers, conclude a party from denying that he was a stockholder.¹⁴ And taking stock in the name of infant children,¹⁵ or subscribing by an agent, will not release the owner of the stock from liability.¹⁶ But where all the stock of a member is legally declared forfeited, he ceases to be a stockholder,¹⁷ and cannot be held liable as such for corporate debts.¹⁸ The same is true where a member, in good faith, transfers his stock to another person, who is accepted by the company as the holder of the stock;¹⁹ but it is otherwise if the transfer be made to the company itself.²⁰ The term "debt" in an action imposing individual liability, includes a liability for a breach of warranty;²¹ and generally a claim for unliquidated damages is a debt within such a statute.²² Assignees of corporate debts are entitled to the benefit of the statute, and may maintain actions against the members.²³ A contract by a stockholder to pay a corporate debt, where no personal liability is imposed by charter or a general law, is an agreement to answer for the debt of another within the statute of frauds, and must be in writing.²⁴

1 *Whitman v. Cox*, 13 Me. 335; *Shaw v. Boylan*, 16 Ind. 384; *Vincent v. Chapman*, 10 Gill & J. 279; *Gray v. Coffin*, 9 Cush. 192; *Nichols v. Thomas*, 4 Mass. 232; *Ireland v. Palestine etc. Turnpike Co.* 19 Ohio St. 389.

2 *Trustees etc. v. Flint*, 13 Met. 539; *Reid v. Eatonton Manuf. Co.* 40 Ga. 93.

3 *Reid v. Eatonton Manuf. Co.* 40 Ga. 93. See as to individual liability declared by statute in the different states: *Larrabee v. Baldwin*, 35 Cal. 135; *French v. Teschemaker*, 24 Id. 518; *Young v. Rosenbaum*, 39 Id. 646; *Lowry v. Parsons*, 52 Ga. 356; *Lloyd v. Hall*, 58 Id. 563; *Wheelock v. Kost*, 77 Ill. 296; *Stewart v. Lay*, 45 Iowa, 604; *Bayliss v. Swift*, 40 Id. 643; *Dodge v. Minn. etc. Roofing Co.* 16 Minn. 368; *President Sav. Instit. v. Jackson etc. Bank*, 52 N. H. 552; *Booth v. Campbell*, 37 Md. 522; *Chamberlin v. Huguenot Manuf. Co.* 118 Mass. 532; *First Nat. Bank v. Almy*, 117 Id. 476; *Conklin v. Furman*, 48 N. Y. 527; *Harris v. Norvel*, 1 Abb. N. C. 127; *Shelington v. Howland*, 67 Barb. 11; *Boynton v. Andrews*, 63 N. Y. 93; *Von Glahn v. Lattimer*, 73 No. Car. 333; *Slocum v. Prov. Steam etc. Co.* 10 R. I. 112; *Ochiltree v. Railroad Co.* 21 Wall. 241; *Upton v. Burnham*, 3 Biss. 529; *Flash v. Conn.* 16 Fla. 423; 26 Am. R. 721; *Allen v. Ward*, 10 Bank. Reg. 235; *Brockway v. Innes*, 39 Mich. 47; 33 Am. R. 348.

4 *Chase v. Merrimack Bank*, 19 Pick. 564; *Second Eccl. Soc. etc. v. First Eccl. Soc. etc.* 23 Conn. 253.

5 *Merchants' Bank v. Cook*, 4 Pick. 405; *Adams v. Wiscasset Bank*, 1 Me. 364; *Jewett v. Thames Bank*, 16 Conn. 511; *Gaskill v. Dudley*, 6 Met. 531. See *North Lebanon v. Arnold*, 47 Pa. St. 438; *Hornor v. Coffey*, 25 Miss. 434.

6 *Corning v. McCullough*, 1 N. Y. 47; *Norris v. Wrenschall*, 34 Md. 422; *Coleman v. White*, 14 Wis. 700; *Wickson v. Neamith*, 46 N. H. 371.

7 *Paine v. Stewart*, 33 Conn. 516; and see *State Sav. Assoc. v. Kellogg*, 63 Mo. 540; *Pettibone v. McGraw*, 6 Mich. 441. Compare *New England etc. Bank v. Newport Steam Factory*, 6 R. I. 154; *Matter of Hollister Bank*, 27 N. Y. 353; *Planters' Bank v. Bivingsville Cotton Manuf. Co.* 10 Rich. 95; *Boyd v. Hall*, 58 Ga. 563.

8 *Corse v. Sanford*, 14 Iowa, 235; *Thayer v. New England etc. Printing Co.* 103 Mass. 523; *Milliken v. Whitehouse*, 49 Me. 527; *Tyng v. Clarke*, 9 Hun. 269. And compare *Hastings v. Drew*, 76 N. Y. 9. But see *contra*, *Miller v. White*, 50 N. Y. 137; reversing *S. C.* 59 Barb. 434; 10 Abb. Pr. N. S. 335; *Larrabee v. Baldwin*, 35 Cal. 135.

9 *Conklin v. Furman*, 8 Abb. Pr. N. S. 161; 57 Barb. 484; *aff'd* 48 N. Y. 27.

10 *Lowry v. Inman*, 46 N. Y. 119; *Haskins v. Harding*, 7 West. Jur. 622; *Moles v. Sprague*, 9 R. I. 541. Compare *Ex parte Van Riper*, 20 Wend. 614; *Hathorn v. Calef*, 53 Me. 471. In some of the states the remedy is in equity only: See *Smith v. Huckabee*, 53 Ala. 191; *Emmert v. Smith*, 40 Md. 123; *Griffith v. Mangum*, 10 Jones & S. 369; 73 N. Y. 611; *Mann v. Pentz*, 3 Id. 416; *Atwood v. R. I. Agr. Soc.* 1 R. I. 376; *Bassett v. St. Albans etc. Co.* 47 Vt. 313; *McRae v. Locke*, 114 Mass. 96; *Hornor v. Hemling*, 13 U. S. 223. But the liability is usually enforceable by an action at law: See *Hathorn v. Calef*, 53 Me. 471; *Stephen v. Ware*, 45 Cal. 110; *Sanborn v. Lafferts*, 58 N. Y. 179; *Culver v. Third Nat. Bank*, 64 Ill. 528; *Phillips v. Therasson*, 11 Hun. 141; *Union Iron Co. v. Pierce*, 4 Biss. 327. If the charter is silent on the subject, the creditor may proceed either in equity or at law: *Adkins v. Thornton*, 19 Ga. 325.

11 *Diven v. Lee*, 36 N. Y. 302. Compare *Chaffin v. Cummings*, 37 Me. 78.

12 *Gay v. Keys*, 30 Ill. 413.

13 *Spear v. Crawford*, 14 Wend. 20; *Hoagland v. Bell*, 36 Barb. 57; *Mudgett v. Horrell*, 33 Cal. 25; *State v. Ferris*, 42 Conn. 560; and see *London etc. Railw. Co. v. Graham*, 1 Q. B. 271.

14 *Dayton etc. R. R. Co. v. Hatch*, 1 Disn. 84; and see *Garling v. Baerthel*, 41 Md. 305; *Haynes v. Brown*, 36 N. H. 545; *Wheelock v. Kast*, 77 Ill. 236; *Beech v. Eyre*, 5 Man. & G. 415.

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15 *Castleman v. Holmes*, 4 J. J. Mar. 1; and see *In re Reid*, 24 Beav. 318; *Ex parte Litchfield*, 3 De Gex & S. 141.

16 *Burr v. Wilcox*, 23 N. Y. 551. See *Mallorie's Case*, Law R. 2 Ch. 81.

17 *Macaulay v. Robinson*, 18 La. An. 619; *Mills v. Stewart*, 62 Barb. 444; *Allen v. Montgomery R. R. Co.* 11 Ala. 437. Compare *Stewart's Case*, Law R. 1 Ch. 511.

18 *Mills v. Stewart*, 62 Barb. 444; 41 N. Y. 384.

19 *Allen v. Montgomery R. R. Co.* 11 Ala. 437. Compare *Bowden v. Santos*, 1 Hughes, 158; *Robison v. Deall*, 28 Ga. 17; *Re Bachman*, 12 Bank. Reg. 224; *Paine v. Stewart*, 23 Conn. 516; *Cowles v. Cromwell*, 23 Barb. 413. A stockholder cannot escape liability by a transfer of his stock to an insolvent: *Provident Sav. Instit. v. Jackson etc. Bank*, 52 Mo. 557.

20 *Matter of Reciprocity Bank*, 22 N. Y. 9.

21 *Dryden v. Kellogg*, 2 Mo. App. 87.

22 *Mill Dam Foundry v. Hovey*, 21 Pick. 417; *Haynes v. Brown*, 36 N. H. 545.

23 *Came v. Brigham*, 39 Me. 35. Compare *Potter v. Stevens Machine Co.* 127 Mass. 562; 34 Am. R. 423.

24 *Trustees etc. v. Flint*, 13 Met. 539. See also *Searight v. Payne*, 3 Tenn. Ch. 175.

CHAPTER XI.

OFFICERS AND AGENTS.

- § 127. Mode of corporate action.
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§ 127. Mode of corporate action.—In general, a corporation aggregate can only act and conduct its business through the intervention of duly authorized agents.¹ And the officers of such a corporation are its mere ministerial agents, whose function it is to conduct the corporate business for the benefit and under the authority of the corporation.² But no person is an agent for the corporation who proceeds without any authority, either previously given,³ or inferred from the subsequent recognition of his acts by the corporation.⁴

¹ See *Planters' Bank v. Andrews*, 8 Port. 404; *Lyman v. White River Bridge Co.* 2 Aiken, 255; 18 Am. Dec. 705; *N. H. Sav. Bank v. Downing*, 16 N. H. 187; *M. E. Church v. Sherman*, 36 Wis. 404; *Muhleman v. Nat. Ins. Co.* 6 W. Va. 508.

² *Burr v. McDonald*, 3 Gratt. 215; and see *Ohio etc. R. R. Co. v.*

McPherson, 35 Mo. 13; Bank of U. S. v. Dandridge, 12 Wheat. 64, 113; State v. City Council, 3 Har. (Del.) 294; Ernest v. Nichols, 6 H. L. 419.

3 Burdick v. Champlain Glass Co. 11 Vt. 19; Hayden v. Middlesex Turnp. Co. 10 Mass. 397. Compare Huntingdon etc. R. R. Co. v. Decker, 83 Pa. St. 119; Custer v. Titusville Gas etc. Co. 63 Id. 381.

4 Perry v. Simpson etc. Manuf. Co. 37 Conn. 520; Smiley v. Mayor etc. 6 Meisk. 604.

§ 128. Power to appoint or constitute.—The power to appoint, or in some other way constitute suitable officers and agents, is incident to aggregate corporate bodies, and need not be conferred by the act of incorporation.¹ Where a corporation has power to act at all, it may appoint an agent to do the act;² and from the mere fact of such appointment, the same powers will flow to the agent as if he had been appointed by an individual;³ and the acts of the agent, within the scope of his authority, will bind the corporation in the same way as if he were the agent of a natural person, and to the same extent.⁴ But officers or agents of a corporation specially empowered to make a contract, or to do a certain act, cannot delegate the trust to sub-agents, unless power to do so is expressly given them;⁵ and, therefore, contracts made by said sub-agents will not bind the corporation.⁶ Unless prohibited by the charter, the officers of a corporation may confer authority upon its agent to draw and execute bills of exchange on behalf of the company.⁷ And in the absence of any prescribed mode of appointing agents to dispose of the property or negotiable securities belonging to a corporate body, it may be presumed that the president, as the head of the organization, has authority to appoint such agents.⁸ And a power of the managing officers of a corporation to employ attorneys and counselors may be presumed.⁹ But authority of a single officer of a railway company, to appoint an agent to exercise extraordinary powers in managing or selling the lands or timber of the company, must be affirmatively shown.¹⁰

1 Hughes v. Parker, 20 N. H. 58; Kitchen v. Girardeau etc. R. R. Co. 59 Mo. 514.

2 See *Atlantic Bank v. Merchants' Bank*, 10 Gray, 532; *Hughes v. Bank of Somerset*, 5 Litt. 45.

3 *Sharp v. Mayor etc.* 25 How. Pr. 389; 40 Barb. 256.

4 *City of Covington v. Covington etc. Bridge Co.* 10 Bush, 69; *Chicago etc. Railw. Co. v. James*, 22 Wis. 194. Compare *Salcin Bank v. Gloucester Bank*, 17 Mass. 1.

5 *Brewster v. Hobart*, 15 Pick. 302; *Percy v. Millauden*, 3 La. 533; *McCormick v. Bush*, 3d Tex. 314; *Tippets v. Walker*, 4 Mass. 593; *Gillis v. Bailey*, 21 N. H. 149. Compare *Dana v. Bank of U. S. & W. & Serg.* 223; *Dorchester Bank v. New Eng. Bank*, 1 Cush. 177; *Palmer v. Yates*, 3 Sand. 137; *Reid v. Memphis Gas Co.* 9 Helsk. 545.

6 *Gillis v. Bailey*, 21 N. H. 149.

7 *Preston v. Missouri etc. Co.* 51 Mo. 43; and see *Bank of Metrop. v. Jones*, 8 Peters, 12; *Ridgway v. Farmer's Bank*, 12 Serg. & R. 256.

8 *Mitchell v. Deeds*, 49 Ill. 416; and compare *Spear v. Ladd*, 11 Mass. 94; *Burrill v. Nahant Bank*, 2 Met. 163; *Bank of Commonw. v. Bank of Brest, Har.* (Mich.) 106.

9 *Southgate v. Atlantic etc. R. R. Co.* 61 Mo. 89; *Western Bank v. Gilstrap*, 43 Ill. 419; and see *State v. Commissioners etc.* 21 Ohio St. 648; *People v. Supervisors etc.* 45 N. Y. 196.

10 *Chicago etc. R. R. Co. v. James*, 22 Wis. 194.

§ 129. How appointed or constituted.—The power to elect or appoint officers or agents, rests in the body of the corporators, unless otherwise expressly provided by the charter, or a general statute.¹ In the latter case, the provisions of the charter or statute must be strictly pursued, or the appointment will not be valid.² But a statute requiring the officers to be chosen as shall be provided by the by-laws of the company, can have no application to the first choice of officers by persons associated together for the purpose of forming themselves into a body corporate, since no by-laws can be adopted by or for a corporation until the corporation itself is created.³ A corporation may appoint an agent by parol;⁴ and that it has done so may be inferred from its adoption of the agent's acts.⁵ Whatever may be the purpose of the agency,⁶ an appointment of the agent by the corporation, or the board of directors through which its business is transacted, is valid, though made without affixing the corporate seal.⁷ Nor is a formal resolution of the board of directors required to make the appointment valid;⁸ appointment by course of business is allowable.⁹

1 *M. E. Church v. Sherman*, 36 Wis. 404; *Haven v. N. H. Asy. for Insane*, 13 N. H. 532; *Brewster v. Hartley*, 37 Cal. 15; *Juker v. Commonw.* 20 Pa. St. 484.

2 See *Brewster v. Hartley*, 37 Cal. 15; *Lyon v. Jerome*, 26 Wend. 635; *Matthews v. Skinker*, 63 Mo. 329.

3 *Boston etc. Manuf. Co. v. Moring*, 15 Gray, 211.

4 *City of Detroit v. Jackson*, 1 Doug. (Mich.) 106; *Garrison v. Combs*, 7 J. J. Mar. 85.

5 *Nicholas v. Oliver*, 36 N. H. 218; *Stanford Bank v. Benedict*, 15 Conn. 437; *Farmers' Mut. Ins. Co. v. Taylor*, 73 Pa. St. 342; *Swan v. Liverpool etc. Ins. Co.* 52 Miss. 704.

6 See *Bank of Columbia v. Patterson*, 7 Cranch, 399.

7 *Wolf v. Goddard*, 9 Watts, 544; *Dispatch Line v. Bellamy Manuf. Co.* 12 N. H. 205; *Randall v. Van Vechten*, 19 Johns. 60; *Topping v. Bickford*, 4 Allen, 120; *Planters' Bank v. Elvingsville Cotton Co.* 10 Rich. 85; and see *Smith v. Cartwright*, 6 Ex. 927; *Austin v. Guardians etc. L. R.* 9 C. P. D. 91.

8 *Bank of Lyons v. Demmon, Hill & D.* 396; *Commercial Bank v. Kortright*, 22 Wend. 343.

9 *Bank of Middlebury v. Rutland etc. R. R. Co.* 30 Vt. 159; *St. Andrew's Bay Land Co. v. Mitchell*, 4 Fla. 192; *Exchange Bank v. Montooth*, 17 Barb. 171.

§ 130. **Appointment, how evidenced.**—In order to establish an agency in behalf of a corporation, it is usual and proper to produce the records or books of the corporation containing the entry or resolution of appointment.¹ But unless the charter or by-laws absolutely require such entry to be made, the appointment is valid without it,² and may be proved by parol.³ And if a corporation refuse to produce its records, the testimony of one who has seen them is competent proof of the appointment and authority of an agent.⁴ So, the authority of an agent may be proved by "facts and circumstances";⁵ or may be shown by acts and the general course of business;⁶ or his appointment may be inferred from the adoption of his acts by the corporation;⁷ or it may be established by estoppel.⁸ If a person acts notoriously as the officer of a corporation, and is recognized by the directors, or by the corporation as an existing officer, a regular appointment will be presumed;⁹ and his acts will bind the corporation, although no written proof is or can be adduced, of his appointment.¹⁰

1 *Brencombe Turnp. Co. v. McCarron*, 1 Dev. & B. 306; *Haven v. N. H. Asylum for Insane*, 13 N. H. 532; *Owings v. Speed*, 6 Wheat. 436; *Benedict v. Lansing*, 5 Denio, 283.

- 2 *Smiley v. Mayor etc.* 6 Helsk. 604.
- 3 *Hamilton v. New Castle etc. R. R. Co.* 9 Ind. 359; *Williams v. Female College*, 29 Mo. 250; *Union Manuf. Co. v. Pitkin*, 14 Conn. 174, 187; *Hoos v. Mayor etc.* 1 Cranch C. C. 90; *Preston v. Mo. etc. Co.* 51 Mo. 43.
- 4 *Narragansett Bank v. Atlantic Silk Co.* 3 Met. 282.
- 5 *North. Cent. R. R. Co. v. Bastian*, 15 Md. 494.
- 6 *Badger v. Bank of Cumberland*, 26 Me. 428; *Bank of Auburn v. Putman*, 1 Abb. Ct. App. 80; 3 Keyes, 343; *Fayles v. Nat. Ins. Co.* 49 Mo. 380; *Union etc. Min. Co. v. Rocky Mt. Nat. Bank*, 2 Cal. 248; *Kelth v. Globe Ins. Co.* 53 Ill. 518.
- 7 *Clark v. Pratt*, 47 Me. 55; *Alabama etc. R. R. Co. v. Kidd*, 29 Ala. 231; *Smiley v. Mayor etc.* 6 Helsk. 604; *Perkins v. Wash. Ins. Co.* 4 Cowen, 645; *Smith v. Birmingham etc. Canal Co.* 1 Ad. & E. 526; *Reg. v. Grimshaw*, 10 Q. B. 747.
- 8 *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278; *Augusta Bank v. Hamblet*, 35 Me. 491; *London etc. Railw. Co. v. Winter*, 1 Craig & P. 57.
- 9 *Bank of U. S. v. Dandridge*, 12 Wheat. 64, 79; and see *Fister v. La Rue*, 15 Barb. 323; *McCullough v. Annapolis etc. R. R. Co.* 4 Gill 58.
- 10 *Bank of U. S. v. Dandridge*, 12 Wheat. 64, 79; *Goodwin v. Union Screw Co.* 34 N. H. 378.

§ 131. Who may be an officer or agent.—In general, any persons duly appointed may act as the agents of corporations, as well as of natural persons.¹ But where the charter prescribes who only shall be the agents of the company for particular purposes, they alone can be made such.² And a by-law which would render a class of persons eligible to office, who by the charter are ineligible, is bad.³ A corporation may employ one of its own members as agent;⁴ and the fact that he acted as auctioneer at a sale of corporate property and signed the memorandum of sale as agent for the purchaser, is no objection to the validity of the sale.⁵ But the principle that a person having a duty to perform for others, cannot act in the same matter for his own benefit,⁶ is strictly applied to agents of corporations.⁷

1 See *Anderson v. Saunderson*, 2 Stark. 204; *Palethorp v. Furnace*, 2 Esp. 511; *People v. Webster*, 10 Wend. 554.

2 *Washington etc. Turnp. Co. v. Crane*, 8 Serg. & R. 521.

3 *Rex v. Bumstead*, 2 Barn. & Adol. 699; and see *Rex v. Mayor, etc.* 7 Mod. 573.

4 *Stoddert v. Vestry of Port Tobacco Parish*, 2 Gill & J. 227.

5 *Stoddert v. Vestry of Port Tobacco Parish*, 2 Gill & J. 227; see also *Bangor Boom Corp. v. Whitney*, 29 Me. 564; *Mayor etc. v. Inman*, 57 Ga. 579.

6 See *Slade v. Van Vechten*, 11 Paige, 21; *Abbot v. American Hard Rubber Co.* 33 Barb. 578; 21 How. Pr. 193.

7 *Cumberland Coal Co. v. Sherman* 30 Barb. 553; *McAleer v. McMurray*, 59 Pa. St. 126; *Cook v. Berlin Woolen Mill Co.* 43 Wis. 433; *Church v. Steidng*, 16 Conn. 388; *Banks v. Judah*, 8 id. 145; *Morrison v. Ogdenburgh*, etc. R. R. Co. 52 Barb. 173. Compare *Smith v. Lansing*, 22 N. Y. 520; *Bradley v. Richardson*, 23 Vt. 720.

§ 132. Powers of officers and agents in general.
—Corporations, like natural persons, are only bound where their agents keep within the limit of their authority.¹ And although, as a general rule, a corporation may be bound by the declarations and admissions of its agents, made within the scope of their authority,² yet, it should not be prejudiced by their unauthorized representations, in the absence of an actual grant of authority or a reasonable presumption of authority to them, from the officers of the corporation authorized to manage its affairs.³ Persons dealing with a corporation are chargeable with notice of such limitations of the powers of officers or agents, as appear in the charter or articles of association, duly recorded;⁴ and the corporation will not be bound by acts which exceed such authority.⁵ A contract made by the general agent of a corporation, in the ordinary course of business, binds the company in a proper case, upon general principles of the law of agency.⁶ But the powers of agents, in respect to contracts, are necessarily limited to such as the corporation may lawfully enter into.⁷ So, a corporation is bound by the tortious conduct of its agents engaged in its business, and acting within the business for which they are employed.⁸ But an agent's authority, if capable of being executed in a lawful manner, is never to be extended by construction to embrace acts prohibited by law,⁹ so as to render the principal liable to a criminal prosecution, or to a statute penalty.¹⁰ And general powers of management conferred upon an agent, must be understood to be limited to correspond with the duties to be performed, and the business to be transacted.¹¹ Thus, the general agent of a manufacturing company is not, by virtue of such agency, authorized to transfer by

deed the real estate of the company;¹² or to pledge or mortgage the machinery used by the company for the security of a loan.¹³ So, the overseer of part of the business of such a company has no authority, by virtue of his office, to bind the company by contract to aid in the extension of a railroad.¹⁴ Nor has the superintendent of a mining company authority, as such, to make notes or contract debts in the name of the company.¹⁵ And it is not within the implied powers of any corporate officer to bind the corporation by an agreement to increase its capital stock.¹⁶ An agent to sell goods is not necessarily an agent to purchase them for the purpose of sale.¹⁷ And a general authority to an agent to purchase on credit, is not necessarily an authority to give the note of the corporation for the price;¹⁸ but it is an authority to make the necessary representations as to the credit and solvency of his principal.¹⁹ A general agent to receive money may bind the corporation by a receipt in full.²⁰ The general financial agent or treasurer may waive notice to the corporation of non-payment of its paper, and may make agreements to procure delay of payment in cases of necessity, of which necessity he is the judge;²¹ and he may negotiate notes or bills taken in the name of his office;²² and the corporation may be held liable upon promissory notes issued by him in accordance with a usage, as well as upon those which it has expressly authorized.²³ Authority to an officer or agent to "sell and convey" land, implies a power to negotiate preliminary to a conveyance, if this be necessary.²⁴

1 Bank of Metrop. v. Gutschlick, 14 Peters, 19; Chicago etc. R. R. Co. v. James, 23 Wis. 194; Burroughs v. Norwich etc. R. R. Co. 100 Mass. 26; Silliman v. Fredericksburg etc. R. R. Co. 27 Gratt. 120.

2 Malecek v. Tower Grove etc. R. R. Co. 57 Mo. 17; Covington etc. R. R. Co. v. Ingles, 15 B. Mon. 637; Henderson v. Railroad Co. 17 Tex. 890; Burnham v. Ellis, 33 Mo. 319; McGenness v. Adriatic Mills, 116 Mass. 177.

3 Custar v. Titusville Gas etc. Co. 63 Pa. St. 381; and see Evans v. Atlantic etc. R. R. Co. 56 Ga. 496; Huntingdon etc. R. R. Co. v. Decker, 82 Pa. St. 119.

4 Root v. Wallace, 4 McLean, 8; Brady v. Mayor etc. 20 N. Y. 312; Clark v. Des Moines, 19 Iowa, 198.

5 *Herzog v. San Francisco*, 33 Cal. 134; *Marsh v. Fulton County*, 10 Wall. 678; *Silliman v. Fredericksburg etc. R. R. Co.* 27 Gratt. 119; *Balfour v. Ernest*, 5 Com. B. N. S. 601; *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278.

6 *Peterson v. Mayor*, 17 N. Y. 449; *Gowan Marble Co. v. Tarrant*, 73 Ill. 606; *McCullough v. Talladega Ins. Co.* 46 Ala. 376; *Smith v. Poor*, 3 Ware, 148; *Mott v. Hicks*, 1 Cowen, 513; 13 Am. Dec. 530; *Munn v. Commission Co.* 15 Johns. 44. That, without express authority, an agent of a corporation cannot bind it for a debt contracted by the company before it was incorporated: see *White v. Westport etc. Manuf. Co.* 1 Pick. 215; and compare *Bell's Gap R. R. Co. v. Christy*, 79 Pa. St. 54; *Western Screw etc. Co. v. Cousley*, 72 Ill. 531.

7 *Downing v. Mt. Wash. etc. Co.* 40 N. H. 230; and see *Drake v. Flewellen*, 33 Ala. 106; *Mechanics' etc. Bank v. Meriden Agency Co.* 24 Conn. 159; *Kitchen v. Cape Girardeau etc. R. R. Co.* 57 Mo. 514.

8 *Smith v. Rathbun*, 66 Barb. 402; *Scotfield etc. Co. v. State*, 54 Ga. 635; *Pittsburg etc. R. R. Co. v. Slusser*, 19 Ohio St. 157; *Saw, er v. Winnegeance Mill Co.* 26 Me. 127; *Jenkins v. Morris*, 16 Mees. & W. 880.

9 *Clark v. Metrop. Bank*, 3 Duer, 241; and see *Marsh v. So. Car. R. R. Co.* 56 Ga. 274.

10 *Clark v. Metrop. Bank*, 3 Duer, 241.

11 *Stow v. Wyse*, 7 Conn. 214; and see *Rankin v. New Eng. etc. Min. Co.* 4 Nev. 78; *Hall v. Auburn Turnp. Co.* 27 Cal. 255.

12 *Stow v. Wyse*, 7 Conn. 214. See also *Chicago etc. R. R. Co. v. James*, 22 Wis. 194.

13 *Dispatch Line v. Bellamy Manuf. Co.* 12 N. H. 206; and see *Whitney v. State Bank*, 7 Wis. 620.

14 *New Haven etc. Co. v. Hayden*, 107 Mass. 525.

15 *Carpenter v. Biggs*, 46 Cal. 91; and see *Atkinson v. St. Croix Manuf. Co.* 25 Me. 171; *Benedict v. Lansing*, 5 Denio, 283.

16 *Finley Shoe etc. Co. v. Kurtz*, 34 Mich. 89.

17 *Kidder v. Knox*, 43 Me. 551.

18 *Emerson v. Prov. Manuf. Co.* 12 Mass. 237.

19 *Hunter v. Hudson River Iron Machine Co.* 20 Barb. 493.

20 *Patterson v. Ackerson*, 2 Edw. Ch. 427.

21 *Whitney v. South Paris Manuf. Co.* 39 Me. 316.

22 *Perkins v. Bradley*, 24 Vt. 66.

23 *Re Great Western Telegraph Co.* 5 Biss. 363. Compare *Ehrgott v. Bridge Manuf.* 16 Kan. 496; *Bank of Auburn v. Putnam*, 1 Abb. Ct. App. 60.

24 *Augusta Bank v. Hamblet*, 35 Me. 491. See *Gillis v. Bailey*, 21 N. H. 149.

§ 133. How their powers must be executed.—

When the charter or act of incorporation prescribes any mode in which the officers or agents of a corporation must execute their powers, that mode must be strictly pursued.¹ But where the charter merely enables a corporation to act in a certain way, it is not thereby precluded from being bound by any other mode adopted by its officers or

agents.² Where an authority to act is conferred jointly upon several, all the agents must act, in order to bind the company.³ And where the agents are required to act together, and as a board, the number necessary to be present at the doing of an act being specified, they must so act, or the company will not be bound.⁴ Thus, the prescribed quorum of directors in a company being there, the secretary affixed the corporate seal to a bond after obtaining the written authority of two directors at a private interview, and the verbal promise of a third to sign the authority at another private interview, and the company was held not to be liable on the bond.⁵ Generally, if it be not otherwise expressly provided, the act of a majority of the board will bind the corporation,⁶ although the others are not consulted.⁷ An agent or attorney of a corporation, in order to bind it by deed, must affix thereto the corporate seal.⁸ If the agent desires to bind the corporation in cases of ordinary contracts, which he makes in its behalf, it is sufficient to name the corporation as the contracting party in the body of the instrument, and sign it as agent or officer of the corporation.⁹ Notes so drawn and signed, will bind the company and not the agent.¹⁰ And generally, the corporation alone will be held liable upon a contract, whatever may be its form, if it appears that credit was given not to the agent, but to the corporation, and that it was the intention of the parties to bind the corporation;¹¹ and parol evidence is admissible to show that the agent acted officially in the transaction.¹²

1 *Dawes v. North River Ins. Co.* 7 Cowen. 462; *Conro v. Port Henry Iron Co.* 12 Barb. 27; *Betts v. Menard*, Brees App. 10; *Head v. Providence Ins. Co.* 2 Cranch. 127; *New York etc. Ins. Co. v. Ely*, 5 Conn. 560; *Matthews v. Skinker*, 63 Mo. 329; *St. Andrew's Bay Land Co. v. Mitchell*, 4 Fla. 192; and see *Diggle v. London etc. Railw. Co.* 5 Ex. 442; *Holland v. San Francisco*, 7 Cal. 361.

2 *Neiffer v. Bank of Knoxville*, 1 Head, 162; and see *Southern Life Ins. etc. Co. v. Lanier*, 5 Fla. 110; *Hayden v. Middlesex Corp.* 10 Mass. 401; *Bissell v. Mich. etc. R. R. Co.* 22 N. Y. 258; *Morris v. Kell*, 20 Minn. 331.

3 *Jewett v. Alton*, 7 N. H. 253; *Corn Exchange Bank v. Cumberland Coal Co.* 1 Bosw. 436. (Compare *Pres. of Union Bridge Co. v. Troy etc. R. R. Co.* 7 Lans. 240; *McCortle v. Bates*, 29 Ohio St. 419.)

4 *Beatty v. Marine Ins. Co.* 2 Johns. 109; *Junction R. R. Co. v. Reeve*, 15 Ind. 236; *Roso v. Crockett*, 14 La. An. 811; *Adams v. Hill*, 16 Ma. 215.

amar etc. Railw. Co. Law R. 2 Ex. 103.

Webster, 12 Met. 497; Lockwood v. Mech. Nat. Bank, 9 Ky. Kentucky High School, 9 Bush, 578; Cram v. Bancroft, 334; Cortis v. Kent Water Works Co. 7 Barn. & C. 101; 8 Term Rep. 454.

1. Great Marlow, 2 East, 244; Samuel v. Holladay, 1 Ken v. Miller, 6 Johns. 39.

2. Clark v. Davis, 8 Conn. 191; Flint v. Clinton Co. 12 N. H. 101; 1 Haun. 350; Zeller v. Ide, 1 Neb. 439; Osborne v. 33. Compare Haven v. Adams, 4 Allen, 80; Tenney v. 100. 43 N. H. 343; West v. Madison Co. Agr. Board, 10 v. High Schools etc. Co. 5 Jones L. 177.

3. Mott, 2 Blinn. 201; Vincent v. Chapman, 10 Gill & J. Duffield, 7 Blackf. 41; Olcott v. Tioga R. R. Co. 27 N.

4. Ocean Mining Co. 21 Cal. 45; Emerson v. Providence 237; Whitney v. Stow, 111 Mass. 368; Sheffield School 1888, 50 Ind. 157; Alexander v. Sizer. Law R. 4 Ex. 102. 5. Mt. Fire Ins. Co. v. Newhall, 1 Allen, 120; Dutton 16 Q. B. 361.

6. Port Henry Iron Co. 12 Barb. 27; Planter's Bank v. 10. 10 Rich. 53; Blanchard v. Kaul, 44 Cal. 440; 3 Bush, 581.

7. Irce, 32 Md. 327; Pease v. Pease, 35 Conn. 131; Mech. Columbia, 5 Wheat. 128; McClellan v. Reynolds, 45 Mo. 3. Bank v. Haight, 3 Hill, 493.

ice of executing their powers.—A corporation act in a strictly corporate capacity out of the state by which it is incorporated;¹ but the acts authorized agents may be performed anywhere not forbidden by positive enactment.² And the state in which such agents are permitted to act is the state in which they act under a general, and not a special authority.³ The directors are the agents of the corporation and not the corporation itself,⁴ and they may act outside of the chartering state;⁵ and the acts of the board at such meeting may be used as evidence of the acts of the board.⁶ The directors, as agents of the corporation, may authorize a conveyance of its real estate held outside of the chartering state.⁷

8. Wer, 27 Me. 509; Galveston R. R. v. Cowdrey, 11 Wall. 101; Hydraulic etc. Co. v. King, 45 Ga. 34.

9. R. R. Co. v. Glenn, 28 Md. 287; Wright v. Bundy, 11 Ind. 101; Creswell, 51 Miss. 817.

10. etc. Ins. Co. v. Hasbrook, 32 Ind. 447.

11. R. R. Co. v. Bowser, 49 Pa. St. 29; Ohio R. R. Co. v. 10. 13; Re German Mining Co 27 Eng. L. & Eq. 156; 12. Man's Fund Ins. Co. 34 Cal. 43.

5 Ohio etc. R. R. Co. v. McPherson, 35 Mo. 13; Smith v. Alvord, 63 Barb. 415; McCall v. Byram Manuf. Co. 6 Conn. 428.

6 Wood Hydraulic etc. Co. v. King, 45 Ga. 34.

7 Arms v. Conant, 36 Vt. 744; Bellows v. Todd, 39 Iowa, 209; but see Miller v. Ewer, 27 Me. 517; Hilles v. Parish, 1 McCart, 380; Ormsby v. Vt. Copper Min. Co. 56 N. Y. 623.

§ 135. *De facto* officials.—“An officer *de facto* is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law.”¹ Cases concerning officers *de facto* are usually those in which there has been the form of an election, though irregular;² or cases of improper holding over, in which the incumbent came rightfully into office.³ By color of election, a person may be an officer *de facto*, though indisputably ineligible.⁴ And it is a general rule, that the acts and proceedings of officers *de facto* of a corporation, if done under color of office, are valid and binding upon the corporation.⁵ And whenever the corporation is bound by the acts of its officers *de facto*, so also will third parties be bound to the corporation.⁶ Appointments made by a *de facto* board of directors are as effectual as if made by a regular legal board.⁷

1 Rex v. Corp. of Bedford Level, 6 East, 368. See Walte & Mining Co. 36 Vt. 18; Parker v. Kett, 1 Ld. Raym. 658.

2 See Baird v. Bank of Washington, 11 Serg. & R. 411; Penolmcott etc. R. R. Co. v. Dunn, 39 Me. 587; Delaware etc. Canal Co. v. Penn. & Coal Co. 21 Pa. St. 131; Cahill v. Kalamazoo Mut. Ins. Co. 2 Dough. (Mich.) 124.

3 See Smith v. Erb, 4 Gill, 437; Knowles v. Luce, Moor, 112; Harris v. Jays, Cro. Eliz. 699.

4 Knight v. Corp. of Wells, Lutw. 508.

5 Matter of Mohawk etc. R. R. Co. 19 Wend. 135; State v. Williams, 27 Vt. 753; Burr v. McDonald, 3 Gratt. 215; Elizabeth City Academy v. Lindsey, 6 Ired. 476; A. aurle etc. R. R. Co. v. Johnston, 70 No. Car. 343; Ebaugh v. German Reformed Church, 3 E. D. Smith, 60; Cooper v. Curtis, 30 Me. 484; Bank of St. Mary's v. St. John, 25 Ala. 566; Re County Life Assoc. Co. Law R. 5 Ch. 286. There can be no such officer as an officer *de facto* in a direct proceeding to try the title to the office; People v. Albany etc. R. R. Co. 1 Lans. 306, 344; 55 Barb. 344, 386; 7 Abb. Pr. N. S. 265, 305.

6 See State Bank at Ellis v. Chetwood, 3 Halst. 1; Charitable Assoc. etc. v. Baldwin, 1 Met. 339.

7 Ellis v. N. C. Instit. etc. 68 No. Car. 423.

§ 136. Determination of agency or office.—As the death of a natural person operates as a revocation of
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authority conferred upon his agents,¹ so the death or dissolution of a corporation, whether by limitation of time or by forfeiture of its charter, revokes all authority of its agents.² But the death or removal of the particular officers, or of the members of the particular board, from the power to appoint agents may be vested, and not determine the agency, since the constituent, the corporation, still continues to exist;³ and the same is true here such officers are appointed for a limited time and the period has expired.⁴ It does not follow from the fact that an agent is in some respects the deputy of an officer, that he is merely an annual officer himself,⁵ and an appointment may have been made to remedy the inconvenience of annual officers.⁶ Where the term of an officer is fixed by the charter, the appointing power has no power to abridge its duration.⁷ Officers whose terms have expired may, unless it is otherwise provided, continue in office until their successors are duly chosen.⁸ If the charter speaks of years in reference to an office, years mean calendar years, and not calendar years, are to be taken as intended.⁹ A person who has been elected to an office and resigns before he is made an incumbent thereof, his attempt to do so is abortive and ineffectual.¹⁰ If a particular mode in which the resignation of an officer is made is prescribed in the charter, that mode must be followed.¹¹ If no mode be prescribed, the resignation may be in writing, or in any particular form of words.¹² And a resignation may be implied from the conduct of the incumbent of an incompatible office;¹³ and an office may be vacated by abandonment.¹⁴ But a resignation, to be effectual, must be accepted by competent authority.¹⁵ The power to accept the resignation of an officer is incident to every corporation;¹⁶ and the acceptance may be by entry in books, by vote, or resolution, or by treating the office as vacant and electing a new officer to fill it.¹⁷

Wis. v. Kerr, 17 Iowa, 72; *Davis v. Windsor Sav. Bank*, 46 Vt. 57; *Saunders*, 23 Ga. 511.

- 2 Union Bank v. Ridgeby, 1 Har. & G. 324.
- 3 Northampton Bank v. Pepoon, 11 Mass. 288; Anderson v. Longden, 1 Wheat. 65. Compare Rex v. Corp. of Bedford Level, 6 East, 354.
- 4 Northampton Bank v. Pepoon, 11 Mass. 288; Exeter Bank v. Rogers, 7 N. H. 33.
- 5 Curling v. Chalklen, 3 Maule & S. 502.
- 6 Curling v. Chalklen, 3 Maule & S. 502.
- 7 Stadler v. City of Detroit, 13 Mich. 346; Vason v. City of Augusta, 28 Ga. 542.
- 8 South Bay etc. Co. v. Gray, 30 Me. 547; Nashville Bank v. Petway, 3 Humph. 523; McCall v. Bryam Manuf. Co. 6 Conn. 428; Smith v. Natchez Steambo. Co. 1 How. (Miss.) 479.
- 9 Rex v. Swyer, 10 Barn. & C. 486.
- 10 Miller v. Supervisors etc. 25 Cal. 93.
- 11 Rex v. Mayor of Ripon, 1 Ld. Raym. 563; Reg. v. Morton, 4 Q. B. 146; Lewis v. Oliver, 4 Abb. Pr. 121.
- 12 Jennings' Case, 12 Mod. 402; People v. Police Board, 26 N. Y. 316; State v. Allen, 21 Ind. 516.
- 13 Rex v. Patterson, 4 Barn. & Adol. 9; Milward v. Thatcher, 2 Term Rep. 87; Regents etc. v. Williams, 9 Gill & J. 365.
- 14 State v. Allen, 21 Ind. 516; Giles v. School District, 31 N. H. 304; Barre v. Greenwich, 1 Pick. 120. Compare Bryan v. Cattell, 15 Iowa, 537.
- 15 Rex v. Patterson, 4 Barn. & Adol. 9; State v. Ferguson, 31 N. J. L. 167.
- 16 Rex v. Tidderly, 1 Sid. 14.
- 17 Rex v. Lane, 2 Ld. Raym. 1304; Van Orsdall v. Hazard, 3 Hill, 243; State v. Ancker, 2 Rich. 245.

§ 137. Removal of officers.—A corporation has an implied power to remove an officer for cause;¹ and this power belongs to the corporation alone.² And, unless the power be delegated to a select body or part,³ it must be exercised by the corporate body at large,⁴ regularly and duly convened.⁵ When the charter prescribes the terms under which the power is to be exercised, they must be strictly pursued.⁶ If the charter or a statute defines the causes for which an officer may be removed, and limits the power of removal to those so defined, he cannot be removed for any other.⁷ The mere fact that good grounds for removal exist does not render the office vacant,⁸ but there must be in addition the exercise of some corporate act.⁹ Generally the officer will be entitled to notice of the intention to remove him and the grounds therefor,¹⁰ and an opportunity will be afforded him to make his

defense.¹¹ But if he holds office under an appointment at pleasure, he may be removed at pleasure, and without notice or a hearing.¹² An officer is not excluded from voting, as a member of the corporation, upon the question of his removal;¹³ nor will his removal from office affect his rights as a mere member of the corporation.¹⁴ And removal from one office does not in the least impair the party's title to another office.¹⁵ But the office from which he is legally removed becomes *ipso facto* vacant from the moment the motion is declared, and another may be chosen to fill the place.¹⁶

1 Reg. v. Newbury, 1 Q. B. 751; Rex v. Richardson, 1 Burr. 517; Fawcett v. Charles, 13 Wend. 473; State v. Trustees etc. 5 Ind. 77. See *QUO WARRANTO*.

2 Neall v. Hill, 16 Cal. 145.

3 See Lord Bruce's Case, 2 Strange, 819; State v. Jersey City, 1 Dutch. 534.

4 Rex v. Mayor etc. 1 Doug. 149; Rex v. Feversham, 8 Term Rep. 336.

5 Lord Bruce's Case, 2 Strange, 819; Rex v. Taylor, 3 Salk. 231. Compare State v. Chamber of Commerce, 20 Wis. 63; People v. Board of Trade, 45 Ill. 112; People v. Medical Soc. 24 Barb. 570.

6 Reg. v. Sutton, 10 Mod. 76; Reg. v. Ricketts, 7 Ad. & E. 966; State v. McGarry, 21 Wis. 496; State v. Trustees etc. 5 Ind. 77; State v. Lungo, 26 Mo. 498.

7 Shaw v. Mayor etc. 19 Ga. 468; 25 id. 590; State v. Jersey City, 1 Dutch. 536. Compare Commonwealth v. St. Patrick's Soc. 2 Binn. 441; Clark v. People, 15 Ill. 213; Chamber of Commerce v. Milwaukee, 20 Wis. 63.

8 Murdock v. Phillip's Acad. 12 Pick. 244.

9 State v. Trustees etc. 5 Ind. 77; Doremus v. Dutch Ref. Church, 2 Green, 332; Commonwealth v. German Soc. 15 Pa. St. 251.

10 Rex v. Mayor etc. 2 Burr. 733; Queen v. Saddlers' Co. 10 H. L. Cas. 404; People v. Benev. Soc. 24 How. Pr. 216; Commonwealth v. Penna. Benef. Instit. 2 Serg. & R. 141.

11 Murdock v. Phillip's Acad. 12 Pick. 244; State v. Adams, 44 Mo. 570.

12 Rex v. Mayor etc. 1 Ld. Raym. 391; Queen v. Governors etc. 8 Ad. & E. 582; Madison v. Korbly, 32 Ind. 74; and see Queen v. Thomas, 8 Ad. & E. 183.

13 Queen v. Sutton, 10 Mod. 74.

14 See Evans v. Phila. Club, 50 Pa. St. 107.

15 Jay's Case, 1 Vent. 362; Rex v. Chalke, 1 Ld. Raym. 326.

16 Symmers v. Regem, Cowp. 503.

§ 138. **Official bonds.**—The charter or act of incorporation usually requires that officers of trust shall give a

bond with sureties for the faithful discharge of their duties.¹ But a bond so given by an officer is valid, though not required by any law, provided it was not unlawfully exacted.² So, the provisions of the charter or act of incorporation, in this respect, are to be deemed merely directory;³ and although a different species of security is taken from that prescribed, it may, nevertheless, be enforced by the corporation.⁴ And, in general, the giving of an official bond is not necessary to the complete appointment and due authorization of the officer or agent, unless it is made a condition precedent thereto by the language of the charter or act of incorporation.⁵ Provisions respecting the acceptance of the bond must be considered as directory, and not as conditions precedent to its validity;⁶ and although the charter requires the bond given by an officer to be approved by the directors, yet a bond given by him with sureties, and found in the possession of the corporation may be presumed to have been accepted and approved, though no vote of acceptance by the directors is found on the records of the corporation.⁷ But a bond given by the agent of a foreign corporation, and taken without compliance with the conditions prescribed by the law of the state to be observed before the company may transact business within the state, cannot be enforced.⁸ A bond well and truly to execute the duties of cashier or teller, includes not only honesty, but reasonable skill and diligence.⁹ And if it is the cashier's duty to be sworn before entering upon the discharge of his official duties, his bond is not avoided in favor of his sureties by his omission to be sworn.¹⁰ But a condition that the officer "shall faithfully discharge the duties of the office, and well behave therein," does not render his sureties responsible for the loss of money by the sudden and unexpected failure of the banking-house in which, using due care, he deposited the funds.¹¹ And a condition "safely to keep all moneys," etc., does not render the obligor liable for money taken from him by violent robbery while in the discharge of his

duty.¹³ Nor are sureties for the fidelity of an agent liable for an embezzlement by the latter of the corporate funds intrusted to him, while engaged for the corporation in a business *ultra vires* of it.¹³ Where the term of office is limited to a particular period, the presumption is, if nothing appear to the contrary, that the official bond was intended to be confined to the particular term;¹⁴ but when the office is held at the will of those making the appointment, and is unlimited as to the term, the presumption is, nothing to the contrary, that the bond was intended to cover all the time the person shall continue in office under the appointment.¹⁵ And the sureties on an official bond given to the directors, who are chosen yearly, are liable after the expiration of the year,¹⁶ and the directors, though out of office, may sue on the bond.¹⁷ A person about to become a surety on an official bond, is entitled to a knowledge of any facts material to his obligation, which are known to the directors, or could easily be obtained by them;¹⁸ and if such facts are withheld, it will discharge the surety.¹⁹ But an omission by the company to investigate the accounts of an officer, where there is no suspicion, and the surety does not request an investigation, will not discharge the surety.²⁰ An official bond, stipulating that the incumbent will "well and truly, faithfully, firmly, and impartially, execute and perform the duties of his office," does not, in legal effect, differ from one which merely stipulates "for the faithful" performance of his duties.²¹

1 See *Maleverer v. Redshaw*, 1 Mod. 35; *Peppin v. Cooper*, 2 Barn. & Ald. 431; *Bank of Northern Liberties v. Cresson*, 12 Serg. & R. 306.

2 *Mayor etc. v. Harrison*, 30 N. J. L. 73.

3 *Bank of U. S. v. Dandridge*, 12 Wheat. 64; *Washington County Ins. Co. v. Colton*, 26 Conn. 42; *Austen v. Howard*, 7 Taunt. 28; *New Orleans Nat. Bank v. Wells*, 28 La. An. 736.

4 *Dedham Bank v. Chickering*, 3 Pick. 335; *Bank of Northern Liberties v. Cresson*, 12 Serg. & R. 306.

5 *Bank of U. S. v. Dandridge*, 64; and see *Hasting v. Bluehill Turnp. Co.* 9 Pick. 80; *State Bank v. Chetwood*, 3 Halst. 1.

6 *Bank of U. S. v. Dandridge*, 12 Wheat. 64.

7 *Bank of U. S. v. Dandridge*, 12 Wheat. 64; and see *Union Bank v. Ridgely*, 1 Har. & G. 324; *Lexington etc. R. R. Co. v. Elwell*, 8 Allen, 371.

8 *Thorne v. Travelers' Ins. Co.* 80 Pa. St. 15.

9 *Barrington v. Bank of Washington*, 14 Serg. & R. 405; *Union Bank v. Forrest*, 3 Cranch C. C. 218; *Minor v. Mech. Bank*, 1 Peters, 46; *Atlantic etc. R. R. Co. v. Cowles*, 69 N. C. 53.

10 *State Bank v. Chetwood*, 3 Halst. 1.

11 *Atlantic etc. R. R. Co. v. Cowles*, 69 No. Car. 59. Compare *Morris Canal etc. Co. v. Van Vorst*, 1 Zab. 100.

12 *Huntsville Bank v. Hill*, 1 Stewt. 201.

13 *Blair v. Perpetual Ins. Co.* 10 Mo. 559. Compare *Melville v. Doidge*, 6 Com. B. 450.

14 *Welch v. Seymour*, 28 Conn. 387; *Manufacturers' etc. Co. v. Odd Fellows' Assoc.* 48 Pa. St. 446; *Liverpool Water Works Co. v. Atkinson*, 6 East, 507.

15 *Exeter Bank v. Rogers*, 7 N. H. 21. Compare *Lexington etc. R. R. Co. v. Elwell*, 8 Allen, 371; *State Treasurer v. Mann*, 34 Vt. 371; *Union Bank v. Kidgeley*, 1 Har. & J. 324.

16 *Anderson v. Longden*, 1 Wheat. 85.

17 *Anderson v. Longden*, 1 Wheat. 85.

18 *Graves v. Lebanon Nat. Bank*, 10 Bush, 23; but compare *Tapley v. Martin*, 116 Mass. 275.

19 *Wayne v. Commercial Nat. Bank*, 52 Pa. St. 343; *Franklin Bank v. Cooper*, 39 Me. 542.

20 *Wayne v. Commercial Nat. Bank*, 52 Pa. St. 343; and compare *Union Bank v. Forrest*, 3 Cranch C. C. 218; *Inhabitants of Radfield v. Shaver*, 50 Me. 36; *Etna Life Ins. Co. v. Mabbett*, 18 Wis. 667; *State v. Atherton*, 40 Mo. 209.

21 *Mayor etc. v. Evans*, 31 N. J. L. 342

§ 139. *Office of directors.*—The directors of a corporation are the persons selected to manage its affairs for the benefit of the shareholders; $\frac{1}{2}$ and unless it be otherwise expressly provided, the administration of all the ordinary affairs of the corporation is committed to them.² They are the chosen representatives of the corporation, and, for all purposes of dealing with others, they constitute the corporation.³ They must be regarded as agents,⁴ but they are the agents of the corporation, and not of the stockholders.⁵ But as it regards their acts in connection with the property held by the corporation itself, and to their management of its business, they are to be deemed trustees for the stockholders.⁶ It is a position of trust, by the acceptance of which the director places himself under an obligation to use his best efforts to promote the interests of the shareholders at large, and not to acquire any adverse interest while holding the position.⁷ His private interests must yield to his duty to the corporation.

whenever they are conflicting.⁸ When the corporation becomes insolvent, and is under the management of the directors, they hold the position of trustees of its assets for the benefit of its creditors.⁹

1 See *York etc. Railw. Co. v. Hudson*, 16 Beav. 495. Compare *State v. Adams*, 44 Mo. 570.

2 *Dana v. Bank of U. S.* 5 Watts & S. 246; *Union Gold Min. Co. v. Rocky Mt. Nat. Bank*, 2 Colo. 565; *Fleckner v. U. S. Bank*, 8 Wheat. 338; *Gashwiler v. Willis*, 33 Cal. 11; *Dayton etc. R. R. Co. v. Hatch*, 1 Disn. 84; *Couro v. Port Henry Iron Co.* 12 Barb. 27.

3 *Maynard v. Firemans' etc. Ins. Co.* 34 Cal. 48.

4 See *Belknap v. Davis*, 19 Mo. 455; *Adrianse v. Roome*, 52 Barb. 359; *Railway Co. v. Allerton*, 18 Wall. 233; *Smith v. Hull Glass Co.* 11 Com. B. 897.

5 *Bank of U. S. v. Dandridge*, 12 Wheat. 113; *Dana v. Bank of U. S.* 5 Watts & S. 246; and see *Maynard v. Firemans' etc. Ins. Co.* 34 Cal. 48.

6 *San Francisco etc. R. R. Co. v. Bee*, 48 Cal. 398; *Covington etc. R. R. Co. v. Winslow*, 9 Bush, 488; *Blake v. Buffalo Creek R. R. Co.* 56 N. Y. 485; *Butts v. Wood*, 38 Barb. 181; *Richards v. N. H. Ins. Co.* 43 N. H. 283; *Commissioners etc. v. Reynolds*, 41 Ind. 509; *Hale v. Republican River Bridge Co.* 8 Kan. 466; *Black v. Del. etc. Canal Co.* 24 N. J. Eq. 463; *Mussina v. Goldthwaite*, 34 Tex. 125; *Jackson v. Ludeling*, 21 Wall. 616; *Parker v. McKenna*, Law R. 10 Ch. 96; *Aberdeen Railw. Co. v. Blaikie*, 1 Macq. 461; *Barues v. Brown*, 60 N. Y. 527. Compare *Spering's Appeal*, 71 Pa. St. 11; 10 Am. R. 684.

7 *European etc. Railw. Co.* 59 Me. 277; *First Nat. Bank v. Reed*, 36 Mich. 263; *Wardell v. Union Pacif. R. R. Co.* 4 Dill. 330; *Kyan v. Lawrence etc. R. R. Co.* 21 Kan. 365; *Cumberland Coal etc. Co. v. Parish*, 42 Md. 508; *Farmers' etc. Bank v. Downey*, 53 Cal. 466; 31 Am. Rep. 63; *Benson v. Heathorn*, 1 Younge & C. Ch. 326.

8 *Ex parte Bennett*, 18 Beav. 339.

9 *Bradley v. Farwell*, 1 Holmes, 433. Compare *Stratton v. Allen*, 16 N. J. Eq. 229; *Buell v. Buckingham*, 18 Iowa, 284; *Whitwell v. Warner*, 20 Vt. 425; *Hoyle v. Plattsburgh etc. R. R. Co.* 54 N. Y. 314.

§ 140. Who eligible as directors, and how selected.—The choice of directors is not limited to persons holding stock, unless the charter or a statute requires it;¹ and where such qualification is expressly required, the owner of shares does not become disqualified by a mortgage of them.² But if stockholders only may be chosen directors, persons having no interest in the stock, but fraudulently receiving the transfer of shares to qualify them, are not eligible.³ A charter provision requiring a certain number of the directors to be practical mechanics, does not require that they should be in actual practice at the time of their appointment.⁴ If ownership of the corporate stock is made a qualification for election,

and a person not thus qualified is elected a director, his acting in that capacity does not amount to an implied contract to take or hold shares,⁵ and will not make him liable for the requisite number of shares to qualify him for the position.⁶ But the corporation will be bound by the acts which he performs, within the scope of the authority possessed by a director.⁷ Directors *de facto* are to be considered, *prima facie*, as directors *de jure*.⁸ Their contracts and other acts are valid, and bind the corporation;⁹ and the legality of their election cannot be inquired into collaterally.¹⁰ In the absence of any controlling regulation or usage, one who is elected a director is presumed to accept the office, unless he declines it.¹¹ No positive act of acceptance is necessary.¹² But this presumption of acceptance may be rebutted;¹³ and long-continued neglect to perform any duty as a director may be deemed equivalent to an abandonment or resignation of the office.¹⁴

1 *State v. McDaniel*, 22 Ohio St. 354; *Re British etc. Assoc. Law R. 5 Ch. Div. 306*. Compare *Despatch Line v. Bellamy Manuf. Co.* 12 N. H. 205.

2 *Cumming v. Prescott*, 2 Younge & C. 488.

3 *Bartholomew v. Bentley*, 1 Ohio St. 37.

4 *Grey v. Mech. Bank etc.* 2 Cranch C. C. 51. That the treasurer or secretary of a company may also be a director: see *Sargent v. Webster*, 13 Met. 497; *Iron Ship Coating Co. v. Blunt*, Law R. 3 Com. P. 454.

5 *Marquis of Abercorn's Case*, 4 DeGex F. & J. 78; *Brown's Case*, Law R. 9 Ch. 102; 8 Eng. 762. Compare *Re Percy etc. Min. Co. Law R. 5 Ch. Div. 705*; *Leeke's Case*, Law R. 6 Ch. 469.

6 *Brown's Case*, Law R. 9 Ch. App. 102; 8 Eng. 762.

7 *Despatch Line v. Bellamy Manuf. Co.* 12 N. H. 205.

8 *Rockville etc. Turnp. Road*, 2 Cranch C. C. 449; and see *Ellis v. No. Car. Instit. etc.* 68 No. Car. 423.

9 *Baird v. Bank of Washington*, 11 Serg. & R. 411; *Cooper v. Curtis*, 20 Me. 438; *Re County Life Assoc. Co.* Law R. 5 Ch. 238.

10 *Mozley v. Alston*, 1 Phill. Ch. 790; *Hughes v. Parker*, 20 N. H. 58; *Eakright v. Logansport R. R. Co.* 13 Ind. 404; *Ohio etc. R. R. Co. v. McPherson*, 35 Mo. 13; *Atlantic etc. R. R. Co. v. Johnson*, 70 No. Car. 243.

11 See *Lockwood v. Mech. Nat. Bank*, 9 R. I. 308; *Blake v. Bayley*, 16 Gray, 531; *Nimmons v. Tappan*, 2 Sweeney, 632.

12 *Fulton Bank v. N. Y. etc. Canal Co.* 4 Paige, 127.

13 *Lockwood v. Mech. Nat. Bank*, 9 R. I. 308.

14 *Bartholomew v. Bentley*, 1 Ohio St. 37. Compare *Re Peninsula etc. Bank*, Law R. 2 Eq. 435; *Phelps v. Lylo*, 11 Ad. & E. 113.

§ 141. Powers of directors in general.—The powers of directors are either defined by the express language of the charter, or are derived by necessary implication therefrom.¹ If the directors exceed the authority granted by the charter, the corporation is not bound by their unauthorized act.² But ordinarily, they may do any act within the range of the corporate business, which the corporation can do, unless restrained by the charter and by-laws.³ Their duties are to conduct the affairs of the corporation in furtherance of the ends of its creation.⁴ They have no power to destroy, or to change fundamentally, the character or extent of the corporation;⁵ nor, in general, can they use the funds of the company for any purpose other than those for which they were contributed.⁶ Special powers given them are to be construed subject to a paramount and inherent restriction, that they are to be exercised in subjection to the special purposes of the original bond of association.⁷ Directors cannot, without express authority,⁸ or by necessary implication,⁹ delegate to others any portion of their power requiring the exercise of discretion or judgment,¹⁰ or which it is intended they shall exercise personally;¹¹ but, unless expressly forbidden so to do, they may authorize subordinate officials to perform mere ministerial acts.¹² It is not within the general powers of directors to release an original subscriber to the capital stock, or to make any arrangement with him by which the company, its creditors, or the state shall lose any of the benefits of his subscription.¹³ Every such arrangement is regarded in equity, not merely as *ultra vires*, but as a fraud upon other stockholders, upon the public, and upon the creditors of the company.¹⁴ Nor is it within the implied power of directors to apply to the legislature for an increase of their powers;¹⁵ or to alienate the property of the corporation needed for the continuance of the corporate business;¹⁶ or to sell bonds of the company;¹⁷ or to allow overdrafts.¹⁸ But a power to accept an amendment is incident to a corporation, and may be exercised

by a board of directors, if not otherwise provided;¹⁹ and so of the power to fix the salary of the treasurer, or other officer of the corporation.²⁰ Contracts made with the corporation, in which the directors are interested, either directly or indirectly, are voidable at the instance of the company or of the shareholders;²¹ and this is so, whether the director entered into the contract in its inception or subsequently acquired an interest in it.²² The rule that notice to an agent is notice to his principal,²³ applies in the case of any duly-authorized agent of a corporation,²⁴ including, of course, a director.²⁵ But in order to bind a corporation by knowledge of a fact on the part of a director, it is necessary that such knowledge be acquired while he is acting officially in the business of the corporation,²⁶ or is at the time acting within the scope of some special agency relative to the subject-matter.²⁷ And the rule is the same in respect to the binding effect upon the corporation of representations and admissions made by a director, or other agent.²⁸

1 *Black v. Del. etc. Canal Co.* 22 N. J. Eq. 133; *Mech. Bank v. New York etc. R. R. Co.* 13 N. Y. 589; *Thompson v. Wesleyan Newspaper Assoc.* 8 Conn. B. 849; *Smith v. Hull Glass Co.* 11 Id. 697; *Finley Shoe etc. Co. v. Kurtz*, 34 Mich. 89; *Dabney v. Stevens*, 40 How. Pr. 341; 10 Abb. Pr. N. S. 33; *Lawrence v. Gebhard*, 41 Barb. 575.

2 *Bank of Kentucky v. Schuylkill Bank*, 1 Pars. Sel. Cas. 160; *Pittsburgh etc. R. R. Co. v. Alleghany Co.* 79 Pa. St. 210; *Adrianse v. Roome*, 52 Barb. 399; *Risley v. Ind. etc. R. R. Co.* 1 Hun. 202; *Ridley v. Plymouth etc. Bank Co.* 2 Ex. 711; *Re German Min. Co.* 27 Eng. L. & Eq. 154; *Athenaeum Life Ins. Soc. v. Pooley*, 3 De Gex & J. 294; *Bargate v. Shortridge*, 5 H. L. Cas. 297.

3 *Maynard v. Fireman's Fund Ins. Co.* 34 Cal. 48; *Railway Co. v. Allerton*, 18 Wall. 231; *Bank of Middlebury v. Rutland etc. R. R. Co.* 3 Vt. 150; *Smith v. Poor*, 3 Ware, 148; *Wright v. Oroville Min. Co.* 40 Cal. 20.

4 *Bedford R. R. Co. v. Bowser*, 43 Pa. St. 29.

5 *Bedford R. R. Co. v. Bowser*, 43 Pa. St. 29; *In re Wheeler*, 2 Abb. Pr. N. S. 361; *Penobscot etc. R. R. Co. v. Dunn*, 39 Me. 687; *Burke v. Smit.*, 16 Wall. 390.

6 *Pickering v. Stephenson*, Law R. 14 Eq. 322.

7 *Pickering v. Stephenson*, Law R. 14 Eq. 322; and see *Railway Co. v. Allerton*, 18 Wall. 231.

8 *Harris' Case*, Law R. 7 Ch. 587.

9 *Harris' Case*, Law R. 7 Ch. 587; and see *Gillis v. Bailey*, 21 N. H. 149; *Howard's Case*, Law R. 1 Ch. 561.

10 *Gillis v. Bailey*, 21 N. H. 149; *Mut. Ins. Co. v. Chase*, 56 Id. 341; *Percy v. Millandon*, 3 La. 568.

- 11 See *Howard's Case*, Law R. 1 Ch. 561; *Cartmell's Case*, Law R. 9 id. 691; § 128, *ante*. But compare *Hoyt v. Thompson*, 19 N. Y. 267; *Read v. Memphis Gas Co.* 9 Helsk. 545; *Stevens v. Hill*, 29 Me. 133.
- 12 *Cartmell's Case*, Law R. 9 Ch. 691; and see *Hitchcock v. Galveston*, 96 U. S. 341; § 128, *ante*.
- 13 *Burke v. Smith*, 16 Wall. 390; *Redford R. R. Co. v. Bowser*, 48 Pa. St. 29; *Jones v. Terre Haute etc. R. R. Co.* 57 N. Y. 186; *Melvin v. Lamar Ins. Co.* 80 Ill. 446; *Osgood v. King*, 42 Iowa, 478.
- 14 *Burke v. Smith*, 16 Wall. 390, 395.
- 15 *Marlborough Manuf. Co. v. Smith*, 2 Conn. 579; *Black v. Del. etc. Canal Co.* 23 N. J. Eq. 133; *Railway Co. v. Allerton*, 16 Wall. 233.
- 16 *Rollins v. Clay*, 33 Me. 132; *African M. E. Church v. Durn*, 19 La. An. 302; *Abbott v. American Hard Rubber Co.* 21 How. Pr. 193; 33 Barb. 578.
- 17 *Titus v. Cairo etc. R. R. Co.* 37 N. J. L. 98.
- 18 *Market St. Bank v. Stumpe*, 2 Mo. App. 545.
- 19 *Dayton etc. R. R. Co. v. Hatch*, 1 Disn. 84.
- 20 *Waite v. Windham County Min. Co.* 37 Vt. 608; see also *Commonw. v. Cullen*, 13 Pa. St. 133; *Hope Mut. Fire Ins. Co. v. Deekman*, 47 Mo. 93; *St. Mary's Church*, 6 Serg. & R. 498.
- 21 *San Diego v. San Diego etc. R. R. Co.* 44 Cal. 106; *Rice's Appeal*, 79 Pa. St. 168; *Alford v. Miller*, 32 Conn. 543; *Port v. Russell*, 36 Ind. 60; *Van Cott v. Van Brunt*, 2 Abb. N. C. 233; *Pacific R. R. Co. v. Seely*, 45 Mo. 212. Compare *Cook v. Berlin Woolen Mill Co.* 43 Wis. 433; *U. S. Rolling Stock Co. v. Atlantic etc. R. R. Co.* 34 Ohio St. 450. See *Smith v. Skeary*, 47 Conn. 47.
- 22 *Lyon v. Lawrence etc. R. R. Co.* 21 Kan. 365; *European etc. Railway Co. v. Poor*, 59 Me. 277.
- 23 See *Bank of U. S. v. Davis*, 2 Hill, 451.
- 24 *New England Car Spring Co. v. Union India Rubber Co.* 4 Blatchf. 1; *Quincy Coal Co. v. Hood*, 77 Ill. 68; *Singer Manuf. Co. v. Holdford*, 66 Ill. 455; *Huntingdon etc. R. R. Co. v. Decker*, 83 Pa. St. 119; *Phelps v. Maxwell Min. Co.* 43 Cal. 336; *Thompson v. Splers*, 13 Sim. 469. Compare *Great West. Railw. v. Wheeler*, 20 Mich. 419.
- 25 *Peruvian Railw. Co. v. Thames etc. Ins. Co.* Law R. 2 Ch. 617; *U. S. Ins. Co. v. Shriver*, 3 Md. Ch. 381; *Bank of Pittsburg v. Whitehead*, 10 Watts, 397; and see *Willis v. Bank of England*, 4 Ad. & E. 21.
- 26 *Winchester v. Balt. etc. R. R. Co.* 4 Md. 231; *Farrell Foundry Co. v. Dart*, 26 Conn. 376; *Smith v. South Royalton Bank*, 32 Vt. 341; *Miller v. Ill. Cent. R. R. Co.* 24 Barb. 312; *Holt's Case*, 22 Beav. 48.
- 27 *Westfield Bank v. Cornen*, 37 N. Y. 320; *First Nat. Bank v. Gifford*, 47 Iowa, 575; *Nat. Security Bank v. Cushman*, 121 Mass. 490; *First Nat. Bank v. Christopher*, 40 N. J. L. 435.
- 28 *Green v. Ophir Min. Co.* 45 Cal. 522; *Soper v. Buffalo etc. R. R. Co.* 19 Barb. 310; *Bank of Lyons v. Ocean Bank*, 60 N. Y. 278; *Lime Rock Bank v. Hewett*, 62 Me. 531; *Loomis v. Eagle Bank*, 1 Disn. 285; *Smith v. N. C. R. R. Co.* 68 No. Car. 107; *Pa. R. R. Co's Appeal*, 80 Pa. St. 265; *Howe Machine Co. v. Know*, 33 Iowa, 433; *Sturges v. Bank of Circleville*, 11 Ohio St. 153; *Jones v. Planters' Bank*, 9 Helsk. 455; *Vicksburg R. R. Co. v. Ragdale*, 54 Miss. 200; *Burnes v. Pennell*, 2 H. L. 497; *Conybeare v. New Brunswick Railway Co.* 9 id. 711; *Re Tring etc. Railw. Co.* 3 De Gex & S. 10; *Deposit Life Ass. Co. v. Ayacough*, 6 El. & B. 763.

§ 142. Rights and liabilities of directors.—Generally, directors are not entitled to compensation for their

services as such,¹ unless provision is made in the law under which the company is organized, or in its by-laws, or in a special contract therefor.² Even a resolution passed by the corporation after the services were rendered, providing that they be paid, is without consideration, and cannot be enforced by action.³ But if a director is appointed by resolution an agent to perform duties not pertaining to his office, he may recover for services rendered by him as such agent.⁴ A director who serves as treasurer of the company is not, however, within this rule.⁵ And a bank director, serving as such, without compensation, cannot recover of the bank a reward offered by it for the recovery of money of which it was robbed, or the detection of the robber;⁶ affording such information must be deemed a part of his duty as director.⁷ But a director may be allowed for services rendered before he became a director,⁸ or for services rendered previous to the organization of the company, and not within the range of his official duties.⁹ And directors are entitled to be reimbursed for money expended by them, in good faith, for the benefit and uses of the company.¹⁰ Directors are bound to administer the affairs of the corporation according to the terms of its charter, and in good faith.¹¹ So, they must act with reasonable care and diligence;¹² and they will be personally responsible for acts of malfeasance, or conduct amounting to gross negligence.¹³ For fraud or breach of trust, directors may be made to account in equity.¹⁴ An action for negligence, against the directors, must be in such form as to protect the interests of all stockholders and creditors;¹⁵ a stockholder cannot have a separate action at law, for the negligence.¹⁶ Nor can a creditor maintain an action against a director for misfeasance or fraud in the management of the corporate funds.¹⁷ Directors are not sureties to the corporators for the fidelity of an officer appointed by the directors, unless they have knowledge of his bad character.¹⁸ And the mere fact that one is a director and stockholder does not render

him liable for the funds and misrepresentations of the active managers.¹⁹ Some knowledge of and participation in the act claimed to be fraudulent must be brought home to the person charged.²⁰ Acts of directors relative to a matter in which they have no authority are null and void;²¹ but if they neglect acts within their authority, and which they ought to perform, they will not afterward be permitted to take advantage of their own neglect.²² The individual liability imposed by statute on the trustees of a company, for omission to make an annual report, is in the nature of a penalty for neglect of duty,²³ and attaches to the individuals in office at the time, and not to the office.²⁴ Such liability can only be enforced within the limits of the state by whose laws it is imposed,²⁵ and it cannot be extended by construction to cases not clearly within the law.²⁶ An action to enforce the liability is an action of tort, not of contract, and the nonjoinder of one of several trustees is, therefore, no defense to the action.²⁷ Nor is anything presumed in aid of such action,²⁸ and the burden is upon the plaintiff to prove all the requisite facts constituting the default.²⁹ A signing of the names of the trustees to a report, by the secretary of the company, is not such a performance of the duty as will relieve the trustees from the liability imposed for the neglect to report.³⁰ Nor is the liability of the trustees to a creditor, for failure to file a report, affected by the fact that the company has ceased to do business, and is engaged in closing up its affairs.³¹ The remedy of ultimate purchasers of spurious stock issued by directors, does not lie against the latter, but against those from whom the purchase was directly made.³²

1 See *Cheaney v. Lafayette etc. Railw. Co.* 68 Ill. 570; *Orden v. Murray*, 39 N. Y. 202; *Pierson v. Thompson*, 1 Edw. Ch. 212; *Hall v. Vt. etc. R. R. Co.* 28 Vt. 401; *Fraylor v. Sonora Min. Co.* 17 Cal. 594.

2 *Hall v. Vt. etc. R. R. Co.* 28 Vt. 401; *Maux Ferry Gravel Road Co. v. Branegan*, 40 Ind. 361; *American etc. R. R. Co. v. Miles*, 52 Ill. 174; *Gridley v. Lafayette etc. R. R. Co.* 71 Ill. 200.

3 *Loan Assoc. v. Stonemetz*, 29 Pa. St. 534; and see *Maux Ferry Gravel Road Co. v. Branegan*, 40 Ind. 361; *Dunston v. Imp. Gas Co.* 3 Barn. & Adol. 123.

- 4 *Hodges v. Rutland etc. R. R. Co.* 29 Vt. 220; *Chandler v. Monmouth Bank*, 1 Green, 253; *Cheaney v. Lafayette etc. Railw. Co.* 68 Ill. 570; *Shackleford v. New Orleans etc. R. R. Co.* 37 Miss. 202; *Santa Clara Min. Ass. v. Meredith*, 49 Md. 389; 33 Am. R. 264. Compare *N. Y. etc. R. R. Co. v. Ketchum*, 27 Conn. 170.
- 5 *Holder v. Lafayette etc. Railw. Co.* 71 Ill. 106; 22 Am. R. 89. But compare *Rogers v. Hastings etc. Railw. Co.* 22 Minn. 23.
- 6 *Stacey v. State Bank*, 4 Scam. 91; and see *Pool v. City of Boston*, 5 Cush. 219.
- 7 *Stacy v. State Bank*, 4 Scam. 91; and see *Cheaney v. Lafayette etc. Railw. Co.* 68 Ill. 570.
- 8 *Branch Bank v. Collins*, 7 Ala. 95.
- 9 *N. Y. etc. R. R. Co. v. Ketchum*, 27 Conn. 170.
- 10 See *Re German Mining Co.* 4 De Gex M. & G. 19; *Re Norwich Yarn Co.* 22 Beav. 143; *Ulster Railw. Co. v. Banbridge etc. Railw. Co.* Law R. 2 Eq. Ir. 193; *Lowndes v. Garnett etc. Min. Co.* 2 Johns. & H. 282. Compare *Re Imp. Land Co.* Law R. 4 Ch. Div. 566; *Chambers v. Manchester etc. Railw. Co.* 5 Beat & Smith, 588; *Hutchinson v. Sidney*, 28 Eng. L. & Eq. 472; *Barstow v. City R. R. Co.* 42 Cal. 465.
- 11 *Hodges v. New England Screw Co.* 1 R. L. 312; *Gilbert's Case*, Law R. 5 Ch. 559.
- 12 *Smith v. Prattville Manuf. Co.* 29 Ala. 503; *Hodges v. New England Screw Co.* 3 R. L. 9.
- 13 *Overend etc. Co. v. Gibb*, Law R. 5 H. L. 480; *Robinson v. Smith*, 3 Palg. 222; 24 Am. Dec. 212; *Pontchartrain R. R. Co. v. Paulding*, 11 La. 41; and see *Turquand v. Marshall*, Law R. 4 Ch. 376; *Sjering's Appeal*, 71 Pa. St. 11; *Lewis v. St. Albans' Iron etc. Works*, 50 Vt. 477; *Gratz v. Kedd*, 4 B. Mon. 178; *Williams v. Gregg*, 2 Strobl. Eq. 316.
- 14 *Bank of St. Mary's v. St. John*, 25 Ala. 566; *Hodges v. New England Screw Co.* 1 R. L. 312. Compare *Chase v. Vanderbilt*, 62 N. Y. 307; *Hale v. Bridge Co.* 8 Kan. 466; *United Soc. v. Underwood*, 9 Bush. 617; *Citizens' Loan Assoc. v. Lyon*, 29 N. J. Eq. 110; *Wright v. Oroville etc. Min. Co.* 40 Cal. 20.
- 15 *Craig v. Gregg*, 83 Pa. St. 19; and see *Smith v. Poor*, 3 Ware, 148; *Young v. Drake*, 8 Hun. 61; *Greaves v. Gouge*, 69 N. Y. 154.
- 16 *Craig v. Gregg*, 83 Pa. St. 19.
- 17 *Zinn v. Mendel*, 8 W. Va. 560; and see *Branch v. Roberts*, 50 Barb. 425.
- 18 *Scott v. Depeyster*, 1 Edw. Ch. 513.
- 19 *Arthur v. Griswold*, 55 N. Y. 400.
- 20 *Wakeman v. Dalley*, 51 N. Y. 27. See *Black v. Del. etc. Canal Co.* 22 N. J. Eq. 420; *Percy v. Millandon*, 3 La. 568; *German Sav. Bank v. Wulfekuhler*, 19 Kan. 60.
- 21 See *Railw. Co. v. Allerton*, 18 Wall. 233; *Bank of Kentucky v. Schuylkill Bank*, 1 Pars. Sel. Cas. 180; *Agar v. Athenæum Life Ins. Soc.* 3 Com. B. N. S. 725; *Brooklyn Gravel Road Co. v. Slaughter*, 33 Ind. 185.
- 22 *Bargate v. Shortridge*, 5 H. L. Cas. 207.
- 23 *Nimmons v. Tappan*, 2 Sweeny, 652; *Dabney v. Stevens*, 2 Id. 415; 40 How. Pr. 341; 46 N. Y. 681; *First Nat. Bank v. Price*, 33 Md. 487.
- 24 *Boughton v. Otis*, 29 Barb. 196; 21 N. Y. 261; *Shaler etc. Quarry Co. v. Bliss*, 34 Barb. 309; 27 N. Y. 297; *Chandler v. Hoag*, 2 Hun. 613; 3 Thomp. & C. 197; and compare *Bank of Mut. Redemption v. Hill*, 56 Me. 385; *Vincent v. Sands*, 42 How. Pr. 231; 1 Jones & S. 511; *Deming v. Puleston*, 55 N. Y. 555.

25 First Nat. Bank v. Price, 33 Md. 487; and see Rice v. Merrimack Hosiery Co. 66 N. H. 114.

26 Crow v. Easterly, 4 Lans. 513; 54 N. Y. 679.

27 Strong v. Sproul, 4 Daly, 326; and see Quigley v. Walter, 2 Sweeny, 175.

28 Whitney Arms Co. v. Barlow, 63 N. Y. 62.

29 Whitney Arms Co. v. Barlow, 63 N. Y. 62; Dabney v. Stevens, 46 Id. 681.

30 Bolen v. Crosby, 49 N. Y. 183.

31 Sanborn v. Lefferts, 53 N. Y. 179. But after the appointment of a receiver, the trustees are no longer liable for omitting to file an annual report: Huguenot Bank v. Studwell, 74 N. Y. 621.

32 Selzer v. Mall, 41 N. Y. 619 n.; 32 Barb. 76.

§ 143. Powers, duty, and liability of treasurer.

In general, the acts of a corporate officer, acting without a special authority, bind the corporation only so far as such acts are within the scope and ordinary course of the duties of his office.¹ If the powers of the treasurer are expressly limited by the by-laws, such powers cannot be extended by inference from the course of business.² He has not, by virtue of his office, authority to pay the debts of the corporation, or to set off the debts due from, by those due to, the company,³ or to assign a chose in action owned by the corporation,⁴ or to assume a debt against a third person;⁵ and authority conferred upon him by the directors to accept drafts on behalf of the corporation, must be strictly proved.⁶ He cannot maintain a suit against the company, upon a claim against it purchased by him.⁷ And a purchase by the treasurer, at a sale under an execution against the corporation, of land held by its trustees, must be deemed as having been made for the benefit of the corporation.⁸ But a treasurer, authorized to issue certificates of the stock of the corporation, may bind it by the fraudulent issue of such certificates, regular in form, though not representing any real stock;⁹ and the corporation will be liable to one who, acting in good faith, loaned money on the fraudulent certificates, supposing them to be genuine.¹⁰ The treasurer of a corporation is charged with the custody of its funds, and it is his duty to keep them distinct from his own, unless other-

wise agreed.¹¹ He is responsible for the safe-keeping of such funds, and the directors cannot lawfully deprive the corporation of the benefit of this responsibility by depositing the funds with others for safe-keeping.¹² The remedy of a stockholder, for a refusal by the treasurer to pay him a dividend, is against the corporation, and not against the treasurer.¹³ But generally, where the treasurer acts in his own behalf, and without the authority of the company, he will be personally liable, although he signs his name as treasurer, reasonably expecting that the company would adopt his acts.¹⁴ If the corporation places a sum of money in the hands of its treasurer, to meet an obligation it has agreed to pay, and the treasurer expends the money for the benefit of the obligee, the corporation by resolution assenting thereto, it cannot afterward hold the treasurer liable for the money.¹⁵ If the treasurer obtain permission to borrow the funds in his hands, upon giving his note with a mortgage, he will not escape liability as treasurer, for the amount, by giving his note without the mortgage.¹⁶ The treasurer of a corporation incurs no liability to an action for false and fraudulent representations made by him, whereby a creditor of the corporation was induced to refrain from attaching the corporate property, and thereby lost his debt.¹⁷ And where penalties are imposed by statute upon the treasurer of a society, for "withholding or misapplying" moneys of the society, which have come into his hands as treasurer, fraud or misrepresentation must be shown in order to render him liable;¹⁸ it is not enough to show a mere inability on his part to pay over the moneys to the trustees.¹⁹

1 *New England etc. Ins. Co. v. Schettler*, 38 Ill. 166; *Town of Concord v. Concord Bank*, 16 N. H. 26; *Booni v. City of Utica*, 2 Barb. 104; *Adrianse v. Roome*, 52 Id. 399; *Wright v. Ga. R. etc. Co.* 34 Ga. 330.

2 *Torrey v. Dustin Monument Assoc.* 5 Allen, 327; and see *Dabney v. Stevens*, 40 How. Pr. 340; 10 Abb. Pr. N. S. 39; 2 Sweeny, 415. But compare *Phillips v. Campbell*, 43 N. Y. 271; *Union etc. Min. Co. v. Rocky Mt. Nat. Bank*, 2 Cold. (Tenn.) 248.

3 *Brown v. Weymouth*, 38 Me. 414.

- 4 Jackson v. Campbell, 5 Wend. 572; Knight v. Lang, 2 Abb. Pr. 227; E. D. Smith, 381.
- 5 Stark Bank v. U. S. Pottery Co. 34 Vt. 144.
- 6 Partridge v. Badger, 25 Barb. 146.
- 7 Hill v. Frazier, 22 Pa. St. 320; and see East N. Y. etc. R. R. Co. v. Elmore, 5 Hun, 214;iland v. Atlantic Nat. Bank, 55 How. Pr. 232.
- 8 McAllen v. Woodcock, 60 Mo. 174.
- 9 Tome v. Parkersburgh etc. R. R. Co. 39 Md. 36; 17 Am. R. 540. Compare Ex parte Chorley, Law R. 11 Eq. 157; Brunton's Claim, Law R. 11 Eq. 303; Mackay v. Commercial Bank of New Brunswick, Law R. 5 Com. P. 394.
- 10 Tome v. Parkersburgh etc. R. R. Co. 39 Md. 36; 17 Am. R. 540.
- 11 Second Av. R. R. Co. v. Coleman, 24 Barb. 300.
- 12 Pearson v. Tower, 53 N. H. 215; and see Bluff Creek v. Hardinbrook, 40 Iowa, 130.
- 13 French v. Fuller, 23 Pick. 103. But if the treasurer puts his refusal to pay the dividend upon the ground that he is himself the owner of the shares, he is liable personally, in assumpsit, for money had and received, at the suit of the real owner of the shares: Williams v. Fullerton, 20 Vt. 346.
- 14 Haynes v. Hunnewell, 42 Me. 276.
- 15 Bay View Homestead Assoc. v. Williams, 50 Cal. 353.
- 16 Bluehill Academy v. Ellis, 32 Me. 260.
- 17 Bradley v. Fuller, 118 Mass. 239.
- 18 Barrett v. Markham, Law R. 7 Com. P. 405.
- 19 Barrett v. Markham, Law R. 7 Com. P. 405.

§ 144. Powers, etc., of president.—The president is the chief executive officer of a business or moneyed corporation, and he may, without special authority, perform all acts of an ordinary nature, which, by usage or necessity, are incident to his office.¹ He may bind the corporation by contracts in reference to matters arising in the ordinary course of its business;² and if he is in the habit of acting as the general business agent of the corporation, with its knowledge, and without objection, actual authority may be inferred from such acts, and the company will be bound by them.³ Although he is not, by virtue of his office, an agent of the corporation to sell its property,⁴ yet his authority may be presumed in aid of an appointment made by him of an agent to sell corporate property.⁵ The president is not authorized, by virtue of his office merely, to borrow money for the company;⁶ or to surrender or release the claims of the com-

pany against any one;⁷ or to waive a condition in a policy of insurance;⁸ or to stay the collection of an execution against the estate of a debtor of the company;⁹ or to undertake, in the corporate name, for the repayment of a loan obtained by an agent of the company without authority.¹⁰ But a bank president, by virtue of his office, has power to take charge of the litigation of the bank.¹¹ He may institute legal proceedings to enforce its claims, and may appear and answer for it in suits against the bank, and may retain and employ counsel on its behalf.¹² Admissions and declarations of the president charge the company only when they relate to matters within the scope of his agency.¹³ The president is usually chosen by the board of directors from their own number,¹⁴ and he has a right to vote upon all questions to be determined by the president and directors.¹⁵ But a power of management conferred upon the "president and directors" is not to be construed as rendering the president an essential part of a quorum, unless so required by the charter or by-laws.¹⁶ In the absence of the president, or in case of a vacancy in the office, the vice-president may act in his stead, although the charter contains no express provision to such effect.¹⁷ An injunction against a corporation, its assigns, agents, employés, and any one acting by its authority, or in its behalf, includes the president of the company, and renders him liable to punishment, if, with notice of such injunction, he does what it prohibits the company from doing.¹⁸

1 See *Chicago etc. R. R. Co. v. Coleman*, 18 Ill. 297; *Sterling v. Marietta Co.* 11 Serg. & R. 179; *Tremont Bank v. Palne*, 28 Vt. 24; *Farmers' Loan etc. Co. v. Mann*, 4 Robt. 356; *Minor v. Mech. Bank*, 1 Peters, 46.

2 *Blenn v. Bear River etc. Co.* 20 Cal. 602. Compare *Jesup v. City Bank*, 14 Wis. 341; *Hodges v. Rutland etc. R. R. Co.* 29 Vt. 220; *Bacon v. Miss. Ins. Co.* 31 Miss. 116; *St. Nicholas Ins. Co. v. Howe*, 7 Bosw. 450; *First Nat. Bank v. Bennett*, 33 Mich. 520.

3 *Dougherty v. Hunter*, 54 Pa. St. 380; and see *Northern etc. Railw. Co. v. Bastain*, 15 Md. 44; *Mt. Sterling Turnp. Co. v. Looney*, 1 Met. (Ky.) 650; *Neiffer v. Bank of Knoxville*. 1 Head, 162; *New Orleans Building Co. v. Lawson*, 11 La. 34.

4 *Walworth County Bank v. Farmers' Loan etc. Co.* 14 Wis. 325; *Gibson v. Goldthwaite*, 7 Ala. 281; *Crump v. U. S. Min. Co.* 7 Gratt. 352; *Hoyt v. Thompson*, 5 N. Y. 320; *Leggett v. Manuf. etc. Co.* 1 Saxt. Ch. 541; 23 Am. Dec. 728.

- 5 *Mitchell v. Deeds*, 49 Ill. 416.
- 6 *Life etc. Ins. Co. v. Mech. Fire Ins. Co.* 7 Wend. 51. See also *Luse v. Isthmus etc. R. R. Co.* 6 Oreg. 125; 25 Am. R. 506.
- 7 *Hodge v. Nat. Bank*, 23 Gratt. 51; *Brouwer v. Appleby*, 1 Sand. 158; *Olney v. Chadsey*, 7 R. I. 224.
- 8 *McEvers v. Lawrence, Hoffm.* (N. Y.) 171.
- 9 *Spyker v. Spence*, 8 Ala. 333.
- 10 *Union Gold Min. Co. v. Rocky Mt. Nat. Bank*, 2 Cold. (Tenn.) 565.
- 11 *American Ins. Co. v. Oakley*, 9 Paige, 496. Compare *Ashuelot Manuf. Co. v. Marsh*, 1 Cush. 507.
- 12 *American Ins. Co. v. Oakley*, 9 Paige, 496; *Oakley v. Workmen's Ben. Soc.* 2 Hilt. 437; *Alexandria Canal Co. v. Swan*, 5 How. 83; *Savings Bank v. Benton*, 2 Met. (Ky.) 240.
- 13 *Spalding v. Bank of Susquehanna Co.* 9 Pa. St. 28; *Green v. Ophir etc. Min. Co.* 45 Cal. 522; *Ilazieton v. Union Bank*, 32 Wis. 34; and compare *Burnham v. Thurman*, 2 Jones & S. 638; *Lime Rock Bank v. Hewitt*, 52 Me. 531.
- 14 See *Currie v. Mut. Ins. Co.* 4 Hen. & M. 315.
- 15 *McCullough v. Annapolis etc. R. R. Co.* 4 Gill, 58.
- 16 *Sargent v. Webster*, 13 Met. 477. Compare *Macbean v. Irvine*, 4 Bibb, 17; *Ridgway v. Farmers' Bank*, 12 Serg. & R. 236.
- 17 *Smith v. Smith*, 62 Ill. 433.
- 18 *State v. Cutler*, 13 Kan. 131.

§ 145. Duties, etc., of secretary.—The secretary is the servant of the directors of a corporation, who are presumed to have control over him as such.¹ But he is not a "servant" within the meaning of a statute declaring stockholders liable for debts of the corporation owing to their "laborers, servants, and apprentices."² The scope of such a statute is to protect those engaged in manual labor.³ The secretary is the proper person to have the custody of and to prove the books of the company.⁴ And the fact that he is a stockholder does not render him incompetent to identify the corporate books and records.⁵ The possession of the corporate books by the secretary is the possession of the company, although they were bought by him and paid for with his own funds.⁶ He cannot retain them after he ceases to be secretary, and he has no lien on them for the purchase-money, or for his services as secretary, or for the use and occupation of his premises by the company while he was secretary.⁷ The secretary has not implied power to bind the company by a draft for money.⁸

1 *Elmes v. Ogle*, 2 Eng. L. & Eq. 379; and compare *Burnside v. Dayrell*, 6 Eng. Railw. Cas. 67; *D'Arcy v. Tamar etc. Railw. Co.* Law R. 2 Ex. 158.

2 *Coffin v. Reynolds*, 37 N. Y. 640; overruling *Richardson v. Abendroth*, 43 Barb. 162.

3 *Coffin v. Reynolds*, 37 N. Y. 640. Compare *Gurney v. Atlantic etc. Railw. Co.* 54 N. Y. 308; *Alkin v. Wasson*, 24 N. Y. 482; *Conant v. Van Schaick*, 24 Barb. 87.

4 *Smith v. Natchez Steamboat Co.* 1 How. (Miss.) 478.

5 *Peake v. Wabash R. R. Co.* 18 Ill. 88.

6 *State v. Goll*, 32 N. J. L. 285.

7 *State v. Goll*, 32 N. J. L. 285.

8 *First Nat. Bank v. Hagan*, 47 Mo. 472.

§ 146. **Compensation of agents.**—In the absence of an express contract under which the services were performed, the servants and agents of a corporation are entitled to be paid for such services what they are reasonably worth.¹ So, if the agent, acting in good faith, and without fault, in the service of the corporation, is subjected to expense, the law implies a promise on the part of the corporation to reimburse him.² So, an agent may recover a fair value for the use of property loaned by him to the company in good faith.³ But a corporation is not liable to one of its servants or agents, for injuries sustained by him through the negligence of another of its servants or agents, when both are engaged in the same general business.⁴ Under a general power conferred by charter, to remove employes at discretion, the corporation cannot without cause discharge a servant engaged for a specific term.⁵ And the inability of the corporation to continue its business will not excuse its breach of contract with an agent.⁶ A person employed in a certain capacity at a fixed rate of compensation, is not entitled to extra pay for unanticipated services rendered in that capacity.⁷ If one employed to procure subscriptions to stock, acts in bad faith in the exercise of such agency, it will operate as a forfeiture of all right to compensation from the corporation.⁸ The president of a corporation is not in general entitled to compensation for official services, unless they are rendered under a special contract. or vote of the

company.⁹ So, a director who serves as treasurer cannot, in the absence of any provision, recover compensation for such services.¹⁰

1 Spence v. Whitaker, 3 Port. 297; Waller v. Bank of Kentucky, 11 J. J. Marsh. 206; Goodwin v. Union Screw Co. 34 N. H. 378; Bill v. Darent Valley R. R. Co. 1 Hurl. & N. 305. See, as to compensation of directors, § 142, *ante*.

2 Powell v. Trustees etc. 19 Johns. 264; Howe v. Buffalo etc. R. R. Co. 37 N. Y. 297; and see Stocking v. Sage, 1 Day, 522.

3 Rider v. Union India Rubber Co. 5 Bosw. 85. See Twin-Lick Oil Co. v. Marbury, 91 U. S. 587.

4 Coon v. Syracuse etc. R. R. Co. 5 N. Y. 492; Warner v. Erie Railw. Co. 39 Id. 468; Harper v. Indianapolis etc. R. R. Co. 47 Mo. 567; Albion v. Agawam Canal Co. 6 Cush. 75; Priestly v. Fowler, 3 Mees. & W. 1; Murray v. So. Car. R. R. Co. 1 McMull. 385.

5 Soldiers' Orphans' House v. Shaffer, 63 Ill. 243.

6 Lewis v. Atlas Mut. Life Ins. Co. 61 Mo. 534.

7 Carr v. Chartier, 25 Pa. St. 337.

8 Cleveland etc. R. R. Co. v. Pattison, 15 Ind. 70.

9 Olney v. Chadsey, 7 R. I. 224; Sawyer v. Pawnors' Bank, 6 Allen, 207; and see Rosborough v. Shasta River etc. Co. 22 Cal. 556; Santa Clara Min. Assoc. v. Meredith, 49 Md. 389; 33 Am. R. 264.

10 Holder v. Lafayette etc. Railw. Co. 71 Ill. 104.

CHAPTER XII.

REMEDIES BY AND AGAINST.

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§ 147. Action at law.—The general doctrine is well-established, that corporations may maintain the same actions to recover debts or property,¹ or to obtain redress for injuries,² as natural persons.³ And by the comity between states,⁴ a corporation created by the laws of one state may sue in the courts of another state.⁵ Corporations created by foreign governments are allowed, by the comity of states, to transact business in the District of Columbia, and to make contracts there upon which they may sue or be sued.⁶ So, a foreign corporation may sue as such in the courts of England.⁷ But a state has the right to impose conditions to be observed by foreign corporations transacting business within its limits:⁸ and

when such conditions are imposed, and a foreign corporation assumes to make contracts without complying with them, it cannot enforce such contracts within the courts of the state,⁹ until the conditions have been complied with.¹⁰ So, the legislature may deny to foreign corporations the privilege of contracting at all within the State;¹¹ and if so, contracts so made will not, of course, be enforced.¹² A corporation acting, through its agents, in a state foreign to its creation, is, in general, capable of being sued in the courts of the latter state;¹³ but such capacity depends generally upon express legislation, varying in different states,¹⁴ authorizing such suits against foreign corporations.¹⁵ A corporation is not in general exempt from being sued by one of its own members for any cause of action he may have against it;¹⁶ and a corporation may sue a member of its own body.¹⁷ An action lies against the corporation, at the suit of a member, for a refusal of its directors to apportion an equable share of its dividends upon his stock;¹⁸ and if all the other stockholders have received and retain their dividends, the corporation cannot set up in defense, that the dividend has not been earned, and that its payment would withdraw a part of the capital.¹⁹ In general, where a corporation is a party to an action in court, it may lawfully take any step allowed to an individual under like circumstances,²⁰ and it is subject to the same general rules of pleading as private persons.²¹

1 *Gordon v. Mayor etc.* 5 Gill, 231; *Western etc. R. R. Co. v. Taylor*, 6 Helsk. 408; *Winona etc. R. R. Co. v. St. Paul etc. R. R. Co.* 23 Minn. 359; *Rehoboth v. Hunt*, 1 Pick. 224, 228.

2 *American Mut. Ins. Co. v. Owen*, 15 Gray, 491.

3 See *Balt. etc. R. R. Co. v. Gallahue*, 12 Gratt. 655; *Metrop. Saloon Co. v. Hawkins*, 4 Hurl. & N. 87; § 46, *ante*.

4 See *Ducat v. Chicago*, 48 Ill. 172; *Williams v. Creswell*, 51 Minn. 817; *Thompson v. Vaters*, 25 Mich. 214; *Cowell v. Springs Co.* 100 U. S. 55.

5 *Eslava v. Ames Plow Co.* 47 Ala. 394; *Hodley v. Freedman's Savings etc. Co.* 2 Tenn. Ch. 122; *Mut. Life Ins. Co. v. Davis*, 12 N. Y. 639; *Fisk v. Chicago etc. R. R. Co.* 4 Abb. Pr. N. S. 378; *Williamson v. Smoot*, Mart. (La.) 31; 12 Am. Dec. 494.

6 *Weymouth v. Washington etc. R. R. Co.* 1 McAr. 19.

7 *Nat. Bank etc. v. De Bernales*, 1 Car. & P. 569. See § 48, *ante*.

8 *West. Un. Tel. Co. v. Mayer*, 28 Ohio St. 521; *Carroll v. City of East St. Louis*, 67 Ill. 568; *Home Ins. Co. v. Davis*, 29 Mich. 238; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 565.

9 *Lamb v. Lamb*, 13 Bank. Reg. 17.

10 *Wood Mowing etc. Co. v. Caldwell*, 54 Ind. 270. Compare *Re Comstock*, 3 Sawy. 218.

11 *Doyle v. Continental Ins. Co.* 94 U. S. 535.

12 *Atterbury v. Knox*, 4 B. Mon. 92; *American Colonization Soc. v. Gartrell*, 23 Ga. 448.

13 *Libbey v. Hodgdon*, 9 N. H. 394; *Cunningham v. Pell*, 5 Paige, 607.

14 See *Rawkright v. Ins. Co.* 55 Ga. 194; *Camden Rolling Mill v. Swede Iron Co.* 32 N. J. L. 15; *Redmond v. Hoge*, 3 Hun, 171; *Balt. etc. R. R. Co. v. Wightman*, 29 Gratt. 431.

15 *Lathrop v. Un. Pacif. Railw. Co.* 1 McAr. 234; and see *Newby v. Van Oppen*, Law R. 7 Q. B. 233.

16 *Culbertson v. Wabash Nav. Co.* 4 McLean, 544; *Westcott v. Fargo*, 6 Lans. 319; and see *Brinham v. Wellersburg Coal Co.* 47 Pa. St. 43.

17 *Connell v. Woodward*, 5 How. 665.

18 *Kane v. Bloodgood*, 7 Johns. Ch. 50; *Brown v. Lehigh etc. Nav. Co.* 49 Pa. St. 270; *Jackson v. Plank R. Co.* 31 N. J. L. 277; *Peckham v. Van Wagonen*, 13 Jones & S. 323; *Jones v. Terre Haute etc. R. R. Co.* 57 N. Y. 136.

19 *Stoddard v. Shetucket Foundry Co.* 34 Conn. 542. But it is the general rule that an individual member cannot, by any direct suit, legal or equitable, call the directors or other officers of the company to account for mismanagement: *Smith v. Hurd*, 12 Met. 371; *Abbott v. Merriam*, 8 Cush. 588; *Allen v. Curtis*, 26 Conn. 456.

20 *Alexandria Canal Co. v. Swann*, 5 How. 83.

21 *Hunt v. City of San Francisco*, 11 Cal. 250.

§ 148. *Suit in equity.*—In general, the rights and duties of corporations are regulated by the common law, which, in most cases, furnishes ample remedies for any excess or abuse of corporate powers and privileges.¹ But if there is no plain and adequate remedy at law, and a case is presented which entitles a party to equitable relief, a suit in equity can be maintained against a corporation;² and this rule applies as well to stockholders as to other persons.³ Fraudulent collusion between the company and any of its creditors, by which its other creditors or stockholders may be wronged or defrauded, would authorize an appeal to equity.⁴ It is clearly settled, that courts of equity will interfere to prevent acts which are beyond the corporate powers;⁵ so, they will interfere to restrain a corporation and its officers from doing acts,

even within the scope of corporate authority, if such acts when done, would, under the particular circumstances, amount to a breach of the trust upon which the authority was conferred.⁶ Where the majority of a company propose to benefit themselves at the expense of the minority, the court may interfere to protect the minority.⁷ If the directors refuse to comply with the vote of a majority of the stockholders, a court of equity will compel them to do so.⁸ If, upon their issuing new stock to stockholders generally, the directors refuse to issue to particular stockholders their due proportions, a suit in equity to compel the proper issue is maintainable against the corporation, provided the company still own stock applicable to the purpose.⁹ And a suit in equity may be maintained to annul the forfeiture of shares.¹⁰ So, a court of equity will entertain jurisdiction to restrain a corporation, and those having the control and management thereof, from acts amounting to a breach of trust,¹¹ although the case may involve, as an incidental question, the inquiry which of two boards of directors is the legal one.¹² But in cases involving no breach of trust, but only error or mistake of judgment upon the part of those who represent the company, the courts will not interfere, even where such error may result in loss to the stockholders.¹³ Generally, a court of equity will decree the specific performance of a contract against a corporation in cases where it would do so if the contract was that of an ordinary individual.¹⁴ Thus, in a proper case, specific performance of a contract to take land and pay a stipulated price, will be enforced in equity against a corporation.¹⁵ So, of a contract by the company to sell some of its land.¹⁶ But specific performance of a contract of directors of a company, which is grossly improvident, will not be enforced.¹⁷ Nor is a contract to build a railroad one which will be compelled by specific performance in equity.¹⁸ An agreement by the directors to take a lease was enforced against them personally, although the agreement

showed that they were trustees for the company.¹⁹ A court of equity may entertain jurisdiction of a suit to reform the contract of a corporation, for mistake,²⁰ or to avoid a contract of a corporation which it had no power to make.²¹

1 See *Treadwell v. Salisbury Manuf. Co.* 7 Gray, 393; *Richmond etc. R. R. Co. v. Richmond*, 26 Gratt. 83; *Phillips v. Commonw.* 44 Pa. St. 197; *Stratford v. Sanford*, 9 Conn. 274; *Reg. v. Birmingham Railw. Co.* 3 Q. B. 223; *Newby v. Oregon Cent. R. R. Co.* 1 Sawy. 83.

2 *Smith v. Bangs*, 15 Ill. 399; *Robinson v. Smith*, 3 Paige, 222; *Seo-field v. Eighth School District*, 27 Conn. 493; *Hodges v. New England Screw Co.* 1 R. I. 112; *Bagshaw v. Eastern Counties Railw. Co.* 7 Hare, 114.

3 *Cunningham v. Fell*, 5 Paige, 607; *Bayless v. Orne*, 1 Freem. Ch. 161; *Sperling's Appeal*, 71 Pa. St. 1; *Dodge v. Woolsey*, 18 How. 331; *Brown v. Mounmouthshire Railw. Co.* 13 Beav. 32.

4 *Dodge v. Woolsey*, 18 How. 331; *Gravenstine's Appeal*, 49 Pa. St. 310; *Menier v. Hooper's Tel. Works*, Law R. 9 Ch. 350.

5 *Dodge v. Woolsey*, 18 How. 331; *Bliss v. Anderson*, 31 Alf. 612; *Lauman v. Lebanon Valley R. R. Co.* 30 Pa. St. 46; *March v. Eastern R. R. Co.* 40 N. H. 548; and compare *Gray v. Lewis*, Law R. 8 Eq. 526; *Gregory v. Patchett*, 33 Beav. 595; *Keut v. Jackson*, 2 Do Gex M. & G. 49; *McMurray v. North. Railw. Co.* 22 Grant Up. Can. 476; *Heath v. Erie Railw. Co.* 8 Blatchf. 338.

6 *Wright v. Oroville etc. Min. Co.* 40 Cal. 20; and see *Rogers v. Lafayette Agr. Works*, 52 Ind. 236.

7 *Menier v. Hooper's Tel. Works*, Law R. 9 Ch. 350; *March v. Eastern R. R. Co.* 40 N. H. 548; *Pratt v. Pratt*, 33 Conn. 448.

8 *Exeter etc. Railw. Co. v. Buller*, 5 Eng. Railw. Cas. 211.

9 *Doushman v. Wisconsin etc. Smelting Co.* 40 Wis. 418.

10 *Sweny v. Smith*, Law R. 7 Eq. 324.

11 *Kimmel v. Stoner*, 18 Pa. St. 155; *Conro v. Port Henry Iron Co.* 12 Barb. 27; *French v. Gifford*, 30 Iowa, 143; *Craig v. Gregg*, 53 Pa. St. 19.

12 *Pond v. Vt. Valley R. R. Co.* 12 Blatchf. 230; and see *Johnston v. Jones*, 8 Green C. L. 216.

13 *Dudley v. Kentucky High School*, 9 Bush, 576; *Hedges v. Paquet*, 3 Oreg. 77; and see *Joslyn v. Mail Steamship Co.* 12 Abb. Pr. N. S. 329; *Foss v. Harbottle*, 2 Hare, 461; *Inderwick v. Snell*, 2 Macn. & G. 216.

14 See *Trenton Water Power Co. v. Chambers*, 1 Stockt. Ch. 471; *N. Y. etc. R. R. Co. v. Pixley*, 13 Barb. 423; *Maxwell v. Dulwich College*, 7 Sim. 227; *Stevens' Hospital v. Dyas*, 15 Ir. Cu. 405; *Marshall v. Corp. of Queenborough*, 1 Blin. & St. 520; *Walnot v. Corp. of Coventry*, 1 Younge & C. 515. Compare *Port Royal R. R. Co. v. Hammond*, 53 Ga. 523.

15 *Inge v. Birmingham etc. Railw. Co.* 23 Eng. L. & Eq. 691.

16 *Wilson v. West Hartlepool Harbor etc. Co.* 2 De Gex J. & S. 475; and see *Lomluster Canal Co. v. Shrewsbury etc. Railw. Co.* 3 Kay & J. 654; *Crampton v. Varna Railw. Co.* Law R. 7 Ch. 562.

17 *Shrewsbury etc. Railw. Co. v. London etc. Railw. Co.* 6 H. L. Cas. 114.

18 *Danforth v. Railroad Co.* 30 N. J. Eq. 12; *Heathcote v. North Staffordshire Railw. Co.* 6 Eng. Railw. Cas. 353; *Ross v. Un. Pacif. Railw. Co.* 1 Woodw. 26; *Fallon v. Railw. Co.* 1 Dill. 121.

19 *Kay v. Johnson*, 2 Hem. & M. 118. See *Haddon v. Ayres*, 1 El. & E. 118; *Pickering's Child*, Law R. 6 Ch. 525; *Dutton v. Marsh*, Law R. 6 Q. B. 361; *Lee v. M. E. Church*, 52 Baro. 115; *Olcott v. Tioga R.R. Co.* 27 N. Y. 545.

20 *Menomonie etc. Manuf. Co. v. Langworthy*, 18 Wis. 444; *West v. Madison County Agr. Board*, 82 Ill. 265.

21 *Auburn Academy v. Strong*, Hopk. Ch. 317.

§ 149. **Injunction.**—An injunction is the proper remedy to restrain a corporation from a gross abuse of its powers, when the acts proposed involve irreparable injury to the party complaining.¹ The remedy may be had to restrain the corporation from doing an unconscionable thing outside of as well as within its ordinary business sphere.² In a proper case, a corporation may be restrained by injunction from applying the corporate property to unauthorized purposes;³ or from constructing works not needed for the corporate business;⁴ or from carrying its assets out of the state of its creation;⁵ or from pressing proceedings for its own dissolution;⁶ or from fouling a stream;⁷ or, an injunction may be granted, in a proper case, to restrain the consolidation of two rival steamboat companies;⁸ or to restrain corporate officers from the continued commission of acts which are contrary to law, and may endanger the existence of the charter;⁹ and where two conflicting bodies of men claim to hold one and the same office under a corporation, at one and the same time, either body may apply for an injunction to restrain the other from usurping powers to which it has no legal title.¹⁰ So, an injunction may be had by one corporation having a vested right, to restrain interference with them by another corporation, if the exigency of the case require it.¹¹ So, if disputes arise between different members of the governing body of a company, which prevent its affairs from being properly carried on, it is a ground for interference by injunction, and the appointment of a receiver.¹² In a proper case, an injunction may be granted to restrain the negligent exer-

cise of the corporate powers in erecting works, and in carrying on the corporate business.¹³ Generally, unless it is otherwise provided, a corporation occupies the same footing and is subject to the same control, under the police power of a State, as individuals, in respect to the use of its property, the exercise of its powers, and the transaction of its business.¹⁴ But injunction is a preventive remedy merely, and application for it must be made promptly, without undue delay, or it will not be granted;¹⁵ it will not do for a party to wait until the mischief of which he complains is accomplished.¹⁶ Thus, it cannot be obtained to secure the restoration of a member who has been improperly expelled by proceedings contrary to the constitution and by-laws.¹⁷ Nor is an injunction a proper remedy where there is a plain and adequate remedy at law.¹⁸ Thus, it does not lie to restrain city authorities from arresting and fining a person for violating a city ordinance;¹⁹ and it is presumably proper to refuse an injunction to restrain the collection of town or city taxes.²⁰ Nor will relief by injunction be granted against the proceedings of the governing body of a corporation, unless it be shown that all the means of compulsion in the power of the corporation have been resorted to in vain.²¹ An injunction, although addressed exclusively to a corporate body, is binding upon all individuals acting for the corporation, to whose knowledge the injunction comes.²² If an injunction against a corporation is served on its president, and he conceals the fact from the other officers, who ignorantly perform acts in violation of it, he will be held liable for a breach of the injunction on his part.²³

1 *Mayor etc. v. Groshon*, 30 Md. 436; *Sandford v. Catawissa etc.* R. R. Co. 24 Pa. St. 378; *Black v. Del. etc. Canal Co.* 9 Green C. E. 435; *Att.-Gen. v. Great North. Railw. Co.* 6 Jur. N. S. 1006; *Att.-Gen. v. Mayor, etc.* 1 Mylne & C. 171; *Spencer v. London etc. Railw. Co.* 8 Sim. 153; 1 Eng. Railw. Cas. 159.

2 *Big Mt. Improvement Co.'s Appeal*, 54 Pa. St. 361; and see *Bona-parte v. Camden etc. R. R. Co.* Baldw. 231; 4 Green C. E. 546.

3 *Binney's Case*, 2 Bland, 59; *Middlesex Turnp. Co. v. Locke*, 8 Mass. 268; *Colles v. Trow City Direc. Co.* 11 Hun, 377. Compare *Bailey v.*

Hollister, 26 N. Y. 112; New Haven etc. R. R. Co. v. Chapman, 38 Conn. 86; Wilson v. Wills Valley R. R. Co. 33 Ga. 466; Hawkins v. Miss. etc. R. R. Co. 35 Miss. 688.

4 Newark Plank R. Co. v. Elmer, 1 Stockt. 754.

5 Matthews v. Trustees etc. 7 Phila. 270; 2 Brews. 541.

6 Singer Sewing Mach. Co. v. Union Button Hole etc. Co. 1 Holmes, 253.

7 Clowes v. Staffordshire etc. Water Works Co. Law R. 8 Ch. App. 125; Holman v. Bolling Spring Bleach. Co. 14 N. J. Eq. 335; and see Att.-Gen. v. Boston Wharf Co. 12 Gray, 553; Mohawk Bridge Co. v. Utica etc. R. R. Co. 6 Paige, 554; Dickenson v. Grand Junction Canal Co. 15 Beav. 250.

8 Watson v. Harlem etc. Nav. Co. 52 How. Pr. 348.

9 Manderson v. Commercial Bank, 23 Pa. St. 379; Dodge v. Woolsey, 18 How. 341; Neall v. Hill, 13 Cal. 145. But an injunction will not be granted against a corporate officer merely on the ground of past misfeasance: People v. Conklin, 5 Hun. 452; nor to prevent the board of directors from merely allowing a correct fraudulent account against the corporation: Rogers v. Lafayette Agr. Works, 52 Ind. 296. And compare Hedges v. Paquet, 3 Oreg. 77.

10 Kerr v. Trego, 47 Pa. St. 252.

11 Florida etc. R. R. Co. v. Pensacola etc. R. R. Co. 10 Fla. 145; Osborne v. Bank of U. S. 9 Wheat. 738; and see Thompson v. N. Y. etc. R. R. Co. 3 Sand. Ch. 623; Gates v. McDaniel, 2 Stewt. 211; 19 Am. Dec. 43.

12 Featherstone v. Cooke, Law R. 16 Eq. 238. Compare Samuel v. Holladay, Woolw. 400; Johnston v. Jones, 8 Green C. E. 216. In this country, the mode of settling such disputes is mainly regulated by statute: see People v. Albany etc. R. R. Co. 57 N. Y. 161; Schommar v. R. R. Case, 12 Abb. Pr. N. S. 394; Brewster v. Hartley, 37 Cal. 15; Webb v. Ridgely, 33 Md. 364.

13 Biscoe v. Great East. Railw. Co. Law R. 16 Eq. 636; Prime v. Twenty-third Street R. R. Co. 1 Abb. N. C. 63; and see St. Louis v. Weber, 44 Mo. 547.

14 Richmond etc. R. R. Co. v. Richmond, 26 Gratt. 83.

15 Van Raust v. College of Veterinary Surgeons, 4 Hun. 620; Lattimer v. Livermore, 72 N. Y. 174; Peabody v. Flint, 6 Allen, 52; Chapman v. Mad River R. R. Co. 6 Ohio St. 119; Thorpe v. Hughes, 3 Myne & C. 742.

16 Chapman v. Mad River R. R. Co. 6 Ohio St. 119; People v. Clark, 70 N. Y. 518.

17 Fisher v. Chicago Board of Trade, 80 Ill. 85.

18 Howe v. Rochester etc. Manuf. Co. 65 Barb. 592; Troth v. Troth, 4 Halst. Ch. 237; Brown v. Concord, 56 N. H. 375; and see State v. Wolfenden, 74 No. Car. 103; Chesapeake etc. R. R. Co. v. Bobbett, 5 Wash. (Va.) 138.

19 Cohen v. Comm'rs of Goldsboro, 77 No. Car. 2.

20 Brown v. Concord, 56 N. H. 375; Wayne v. Mayor etc. 56 Ga. 448.

21 Foss v. Harbottle, 2 Hare, 461; and see Mozley v. Alston, 1 Phill. Ch. 790.

22 People v. Sturtevant, 9 N. Y. 263; and see Brown v. Pacific Mail Steamship Co. 5 Blatchf. 525; State v. Cutler, 13 Kan. 131.

23 Bank Comm'rs v. City Bank, cited in 9 N. Y. 277.

§ 150. **Who may bring suit.**—Incorporation confers upon the board of directors in the first instance the authority to institute and direct a suit;¹ and there must be a clear default on their part, involving a breach of duty, before a stockholder can institute a suit against a wrongdoer whose acts operate to the prejudice of the interests of the stockholders.² But where the board of directors are themselves the wrongdoers,³ or they refuse to prosecute to restrain or redress the wrong, stockholders may institute the suit.⁴ Such refusal must however be shown, in order to give the stockholder any standing in court,⁵ unless the complaint shows matter of excuse for not averring it, which renders the averment needless.⁶ In respect of a proceeding which is strictly *ultra vires* of the corporation, any single corporator has a right to sue, either to prevent its being done, or to restrain its continuance or repetition.⁷ And he may sue on behalf of himself, and not on behalf of himself and others, if he only be aggrieved;⁸ but when the wrong is to a class or number of the corporators, suit should be instituted by him or them on behalf of all.⁹ If the directors, or some of them, so act as to prevent a majority of the members from exercising a proper control over the affairs of the company, a suit against them is properly brought by a single shareholder on behalf of himself and all other shareholders, except the defendants.¹⁰ So, one shareholder may bring suit on behalf of the others and against the company, where the majority of a company attempt to benefit themselves at the expense of the minority.¹¹ But a person cannot be sole plaintiff in such suit, who is not actually a full and complete member of the company.¹² One having a mere inchoative right of membership,¹³ or who has sold his shares, though he may be still under liabilities, cannot, therefore, institute the proceedings.¹⁴ Nor can a simple contract creditor institute such a suit.¹⁵

¹ *Memphis v. Dean*, 8 Wall. 64; and see *Railway Co. v. Alling*, 39 U. S. 463; *Greaves v. Gouge*, 69 N. Y. 154.

² *Memphis v. Dean*, 8 Wall. 64.

3 *Pond v. Vt. Valley R. R. Co.* 12 Blatchf. 290; *Hersey v. Veazie*, 24 Me. 9; *Brown v. Vandyke*, 4 Halst. Ch. 755.

4 *Dodger v. Woolsey*, 19 How. 331; *Hodges v. New England Screw Co.* 1 R. I. 312; *Allen v. Curtis*, 20 Conn. 456.

5 *Memphis v. Deau*, 8 Wall. 64; *Davenport v. Dows*, 13 id. 626; *Wilkie v. Rochester etc. R. R. Co.* 2 Hun. 242; *Ware v. Bazemore*, 53 Ga. 318; *Newby v. Oregon etc. Railw. Co.* 1 Sawyer, 63; *Hazard v. Durant*, 11 R. I. 195.

6 *Henth v. Erie Railw. Co.* 8 Blatchf. 347; *Cogswell v. Bull*, 39 Cal. 220; *Talbot v. Scripps*, 31 Mich. 268; *Black v. Higgins*, 2 Tenn. Ch. 790; *Mussina v. Goldthwaite*, 35 Tex. 125; *Forbes v. Memphis etc. R. R. Co.* 2 Woods, 323; *Brewer v. Boston Theatre*, 104 Mass. 353.

7 *March v. Eastern R. R. Co.* 40 N. H. 566; *Zabriskie v. Cleveland etc. R. R. Co.* 23 How. 381; *Samuel v. Holladay*, 1 Woolw. 400; *Bliss v. Anderson*, 31 Ala. 613; *Russell v. Wakefield Water Works Co.* Law R. 20 Eq. 474; *Foss v. Harbottle*, 2 Hare, 431; and see *Wright v. Oronville etc. Mtn. Co.* 40 Cal. 20; *Mills v. North. Railw. etc. Co.* Law R. 5 Ch. App. 621.

8 *Stevens v. South Devon Railw. Co.* 9 Hare, 313; *Carlisle v. South-eastern Railw. Co.* 2 Hall & T. 366; 6 Eng. Railw. Cas. 670.

9 See *Cunningham v. Fell*, 5 Palge, 637; *Young v. Drake*, 8 Hun. 61; *Mason v. York etc. R. R. Co.* 51 Me. 107; *Gray v. N. Y. etc. Steamship Co.* 5 Thomp. & C. 224; *West v. Randall*, 2 Mas. C. C. 118; *Smith v. Swornstedt*, 16 How. 302; *Craig v. Gregg*, 81 Pa. St. 19; *Yette v. Norfolk Railw. Co.* 3 De Gex & S. 23; *Coates v. Nottingham Water Works Co.* 30 Bray. 88; *Henry v. Great Northern Railw. Co.* 4 Kay & J. 1; 1 De Gex & J. 606; *Sweny v. Smith*, Law R. 7 Eq. 324; *Davidson v. Grange*, 4 Grant (Up. Can.) 377.

10 *Macdougall v. Gardiner*, Law R. 20 Eq. 383; and see *Mussina v. Goldthwaite*, 34 Tex. 125; 7 Am. R. 281.

11 *Menier v. Hooper's Tel. Works*, Law R. 9 Ch. App. 350; and see *Salmon v. Randall*, 3 Mylne & C. 444; *Gifford v. N. J. R. R. Co.* 2 Stock. Ch. 171.

12 See *Walker v. Devereaux*, 4 Palge, 229; *Randall v. Crystal Palace Co.* 4 Kay & J. 326; *Evans v. Corp. of Avon*, 29 Beav. 144; *Adley v. Whitstable Co.* 19 Ves. 304.

13 *Busey v. Hooper*, 35 Md. 15; *Spackman v. Lattimore*, 3 Giff. 16; *Lake Superior Nav. Co. v. Morrison*, 21 Up. Can. C. P. 217.

14 *Doyle v. Muntz*, 5 Hare, 509. See *Bart v. British etc. Life Assoc.* 4 De Gex & J. 138; *Hubbell v. Warren*, 8 Allen, 173.

15 *Mills v. North. Railw. Co.* Law R. 5 Ch. 621; and see *Evans v. Coventry*, 5 De Gex M. & G. 911; *Kenans v. Leaf*, 1 Hem. & M. 681. But compare *Lothrop v. Stedman*, 43 Conn. 583.

§ 151. Against whom suit should be brought.—

In a suit to prevent or restrain acts or proceedings of any kind which are *ultra vires*, the corporation itself must be made a party;¹ and if other parties are immediately concerned in the *ultra vires* proceeding, they should also be represented.² Thus, where two corporations enter into an *ultra vires* agreement, and a suit is brought by a shareholder in one of the companies, to restrain the execution of the agreement, both companies should be made defend-

ants;³ but directors and shareholders who promoted the agreement need not be joined as defendants,⁴ unless direct relief is required against them,⁵ or it is sought to hold them responsible for damage caused by the *ultra vires* proceedings.⁶ In a suit against the directors, for a fraudulent breach of trust, the corporation itself, if in existence, is a necessary party;⁷ but it is not necessary to make all the fraudulent directors parties,⁸ which is an exception to the general rule, that in a proceeding against trustees all must be made parties.⁹ The rule that precludes a person from being both plaintiff and defendant to the same action,¹⁰ has no application to actions brought by corporations;¹¹ and a corporation may sue its own members, although the names of defendants appear on the record as plaintiffs.¹²

1 See *Heath v. Erie Railw. Co.* 8 Blatchf. 347; *Tyson v. Virginia R. R. Co.* 1 Hughes, 60; *Greaves v. Gouge*, 63 N. Y. 154; 49 How. Pr. 79; *Gregory v. Patchett*, 33 Beav. 5.5.

2 *Ward v. Sittingbourne Railw. Co.* Law R. 9 Ch. 488; *Ferguson v. Wilson*, Law R. 2 Ch. 10; *Johnson v. Candage*, 31 Me. 23; *Att.-Gen. v. Toronto Street Railw. Co.* 14 Grant (Up. Can.) 673.

3 *Winch v. Birkenhead etc. Railw. Co.* 5 De Gex & S. 562; *Hare v. London etc. Railw. Co.* 1 Johns. & H. 232.

4 *Winch v. Birkenhead etc. Railw. Co.* 5 De Gex & S. 562; and see *People v. Sturtevant*, 9 N. Y. 263; *Heath v. Erie Railw. Co.* 8 Blatchf. 347.

5 *Fawcett v. Laurie*, 1 Drew. & S. 192.

6 *Hardy v. Metrop. Land etc. Co.* Law R. 7 Ch. 427; *Heath v. Erie Railw. Co.* 8 Blatchf. 347. See *East Rome Town Co. v. Nagle*, 58 Ga. 474.

7 *Greaves v. Gouge*, 63 N. Y. 154; *Ferris v. Strang*, 3 Edw. Ch. 127; and see *Smith v. Poor*, 40 Me. 415.

8 *Mayner. Griswold*, 3 Sand. 463; *Cunningham v. Pell*, 5 Paige, 607; *People v. Sturtevant*, 9 N. Y. 263. A court of equity has jurisdiction to make the officers of a corporation parties for the purpose of discovery. *McIntyre v. Trustees etc.* 6 Paige, 239; *McKin v. Odori*, 3 Bland, 421; *Hatch v. Chicago etc. R. R. Co.* 6 Blatchf. 105; *Bevans v. Dingman's Turnp.* 10 Pa. St. 174.

9 *Protection Ins. Co. v. Dummer*, cited in 5 Paige, 612; *Wilson v. Moore*, 1 Mylne & K. 127.

10 See *Richards v. Richards*, 2 Barn. & Adol. 47; *Sherwood v. Barton*, 36 Barb. 264; 23 How. Pr. 538; *Engliss v. Furniss*, 2 Abb. Pr. 333; 4 E. D. Smith, 587.

11 *Connell v. Woodward*, 5 How. (Miss.) 665.

12 *Connell v. Woodward*, 5 How. (Miss.) 665; and see *Barnstead v. Empire Mln. Co.* 5 Cal. 2 3; *Waring v. Catawba Co.* 2 Bay, 110; *Culbertson v. Wabash Nav. Co.* 4 McLean, 647.

§ 152. **Appearance by corporation.**—A corporation can appear only by attorney;¹ but the usual practice of permitting appearance without producing a warrant of attorney, extends to appearance for a corporation, as well as for a natural person;² and a corporation, like a natural person, may appear voluntarily by attorney, and such appearance gives jurisdiction to the same extent as if there was actual service of process.³ Process against a corporation should be served on its head or principal officer;⁴ and service upon a private individual member is not, in general, sufficient to charge the corporation;⁵ and the individual served may plead the want of notice to the corporation.⁶ Officers *de facto* are competent to receive service.⁷ A statute directing service of process on the "managing agent" of a corporation, has reference to such agents as have a general supervision over the affairs of the corporation,⁸ in distinction from the management of a particular branch or department of its business.⁹ It is no objection to the service of a writ in favor of a corporation, that it was made by an officer who is a member.¹⁰

1 *Osborne v. Bank of U. S.* 9 Wheat. 738. In a plea to the jurisdiction of the court a corporation may appear by its president: *Quarrier v. Peabody Ins. Co.* 10 W. Va. 507.

2 *Osborne v. Bank of U. S.* 9 Wheat. 738; and see *Republic of Mexico v. Arrangois*, 1 Abb. Pr. 437; 5 Duer, 643; *Commissioners of Excise v. Purdy*, 13 Abb. Pr. 434; 38 Barb. 268; *Gillespie's Case*, 3 Yerg. 325.

3 *McCormick v. Penn'a R. R. Co.* 49 N. Y. 303; *Att.-Gen. v. Guard. Mut. Life Ins. Co.* 77 N. Y. 272; see also *De Beiner v. Drew*, 57 Barb. 438; 39 How. Pr. 466; *Latimer v. Union Pacif. Railw.* 43 Mo. 105.

4 *M'Quinn v. Middletown Manuf. Co.* 16 Johns. 5; and see *McCall v. Byram Manuf. Co.* 6 Conn. 428; *Chamberlin v. Mammoth Min. Co.* 20 Mo. 86; *Boyd v. Chesapeake etc. Canal Co.* 17 Md. 195; *Gilling v. Independent etc. Min. Co.* 1 Nev. 247.

5 *O'Brien v. Shaw's etc. Canal Co.* 10 Cal. 343; *Willamette etc. Co. v. Williams*, 1 Oreg. 112; and see *Peirce v. Somersworth*, 10 N. H. 369; *Oxford Iron Co. v. Sproddy*, 43 Ala. 24; *St. Louis etc. Railw. Co. v. Dorsey*, 47 Ill. 288.

6 *Rand v. Proprietors of Locks*, 3 Day, 441.

7 *McCall v. Byram Manuf. Co.* 6 Conn. 428; *Berrian v. Meth. Soc.* 4 Abb. Pr. 424.

8 *Upper Miss. Transp. Co. v. Whittaker*, 16 Wis. 220. See also *Parke v. Commonw. Ins. Co.* 44 Pa. St. 422; *American Express Co. v. Johnson*, 17 Ohio St. 641.

9 *Brewster v. Mich. Cent. R. R. Co.* 5 How. Pr. 183; *Emerson v. Auburn etc. R. R. Co.* 13 Hun, 150.

10 *Merchants' Bank v. Cook*, 4 Pick. 405.

§ 153. Averment and proof of incorporation.—

It was held to be the rule of the common law in many of the earlier decisions, that a corporation when suing must, at the trial, under the general issue, prove the fact of incorporation.¹ On the other hand, the rule established in many of the states was, that a plea of the general issue to a declaration by a corporation pleading as such, was an admission of the plaintiff's corporate capacity to sue,² which dispensed with the necessity of any proof as to that point;³ and that decisions in support of a general rule to the contrary were exceptional cases, in which the plaintiff was a foreign corporation.⁴ Generally, in modern practice, proof of incorporation is dispensed with, unless the fact of incorporation is specially denied in pleading.⁵ And when proof of incorporation is necessary, a complaint in the name of the incorporation is a sufficient averment of incorporation to let in such proof on the trial,⁶ unless the provisions of the charter are material to the cause of action, in which case the charter should be set forth in the declaration.⁷ A corporation may, in general, be declared against by what purports to be a corporation name, without alleging it to be chartered or incorporated,⁸ or setting forth by averment how it acquired that name.⁹ And by appearing and answering to the merits, a corporation admits its corporate existence, and that the defendant is correctly named.¹⁰

1 See *Henriques v. Dutch West India Co.* 2 Ld. Raym. 1532; *Jackson v. Plumb*, 8 Johns. 373; *U. S. Bank v. Stearns*, 15 Wend. 314; *Taylor v. Bank of Alexandria*, 5 Leigh. 471; *Wolf v. Goddard*, 9 Watts, 644; *Lewis v. Bank of Ky.* 12 Ohio, 132; *Buncombe Turnp. Co. v. Carson*, 1 Dev. & B. 306; *Central Manuf. Co. v. Hartshorne*, 3 Conn. 199; *Trustees etc. v. Hills*, 6 Cowen, 23.

2 *Orono v. Wedgewood*, 44 Me. 49; *Whittington v. Farmers' Bank*, 5 Har. & J. 489; *Miss. R. R. Co. v. Cross*, 20 Ark. 443; *Zion Church v. St. Peter's Church*, 5 Watts & S. 215; *McIntyre v. Preston*, 5 Gilm. 48; *Carpenter v. Mercantile Bank*, 17 Ind. 233; *West Winsted Savings Bank v. Ford*, 27 Conn. 282.

3 *Prince v. Commercial Bank*, 1 Ala. 241; *Christian Soc. v. Macomber*, 3 Met. 235; *Insurance Co. v. Peck*, 28 Vt. 93.

4 School District v. Blaisdell, 6 N. H. 197; and see Waterville Manuf. Co. v. Bryan, 14 Barb. 182; Henriques v. Dutch West India Co. 2 Ld. Raym. 1532.

5 Chickering Lodge etc. v. McDonald, 16 Wis. 112; Gillett v. American Stove etc. Co. 2 Gratt. 563; Roberts v. Nat. Ice Co. 6 Daly. 426; Chance v. Indianapolis R. R. Co. 32 Ind. 422; Star Brick Co. v. Ridsdale, 30 N. J. L. 229; La Fayette Ins. Co. v. Rogers, 30 Barb. 491; Gott v. Adams Express Co. 100 Mass. 320; Chickering Lodge etc. v. McDonald, 16 Wis. 112; California Steam Nav. Co. v. Wright, 6 Cal. 258.

6 Marine etc. Ins. Bank v. Janney, 1 Barb. 486; Howe Machine Co. v. Robinson, 7 Daly, 393; Selma etc. R. R. v. Tipton, 5 Ala. 737; Rees v. Coucochesque Bank, 6 Rand. 326; 16 Am. Dec. 753.

7 Hahnemannian Life Ins. Co. v. Beebe, 43 Ill. 87.

8 Woolf v. City Steamboat Co. 7 Com. B. 103; Light v. Everett Fire Ins. Co. 5 Bosw. 716.

9 Hart v. Balt. etc. R. R. Co. 6 West Va. 336; Dodge v. Minn. etc. Roofing Co. 14 Minn. 49.

10 Missouri River etc. R. R. Co. v. Shirley, 30 Kans. 660; School District v. Griner, 8 Id. 234; Lake Superior Build. Co. 32 Mich. 293.

§ 154. How incorporation may be proved:— Ordinarily, when it becomes necessary to prove incorporation, it is sufficient to show that a company is a corporation *de facto*.¹ If the company had in form a charter authorizing it to act as a body corporate, and was, in fact, in the exercise of corporate powers at the time of the transaction in question, then it was as to all persons except the state a corporation *de facto*;² and the validity of its corporate existence can be tested only in proceedings by the state.³ Parties who recognize the existence of corporations by dealing with them⁴ have no right to object to any irregularity in their organization or any subsequent abuse of their powers not connected with such dealing.⁵ As long as these are overlooked or tolerated by the state, it is not for individuals to call them in question.⁶ But mere acting as a corporation for any period of time, however long continued, will not establish the existence of a corporation *de facto*;⁷ the existence of a charter, or some law under which a corporation with the power assumed might lawfully be created, is necessary.⁸ In the case of a domestic corporation, its existence may be proved either by an exemplified copy of the charter or act of incorporation,⁹ or the act may be read or produced in the printed

statute-book.¹⁰ In the case of a foreign corporation, an exemplified copy must be produced if required.¹¹ If the copy fail as proof, owing to defective authentication, its accuracy may be proved by a witness.¹² The organization of a corporation is in general provable by the books of the corporation.¹³ Corporate existence under a general act may, unless it is otherwise provided, be proved by the production of the certificate of organization, which is required to be filed,¹⁴ with proof of such filing.¹⁵ User may be established by evidence showing the repeated performance of corporate acts;¹⁶ such acts as corporations are competent to perform, but which individuals cannot perform.¹⁷ Acts of individuals which would not be corporate acts if there were a charter, will not be acts of user.¹⁸

1 *M. E. Union Church v. Pickett*, 19 N. Y. 482; *Rondell v. Fay*, 32 Cal. 334; *Narragansett Bank v. Atlantic Silk Co.* 3 Met. 232; *Slocum v. Warren*, 10 R. I. 124; *Commonw. v. Cullen*, 13 Pa. St. 133; *Merriman v. Magiveney*, 12 Holk. 44.

2 *Williams v. Bank of Mich.* 7 Wend. 539, 553; *Jones v. Dana*, 24 Barb. 335; and see *People v. Frank*, 23 Cal. 507; *Scarsburgh Turnp. Co. v. Cutler*, 6 Vt. 314; *Way v. Billings*, 2 Mich. 347.

3 *M. E. Union Church v. Pickett*, 19 N. Y. 482.

4 See *Board of Comm'rs etc. v. Shields*, 62 Mo. 247; *Newburg Petroleum Co. v. Wear*, 27 Ohio St. 343; *Jones v. Dana*, 24 Barb. 335.

5 *Steam Nav. Co. v. Weed*, 17 Barb. 378; *White v. Coventry*, 29 Id. 305; *Eppes v. Miss. etc. R. R. Co.* 35 Ala. 33; and compare *the Comstock*, 3 Sawy. 218; *Ransom v. Plain Lodge*, 51 Ind. 60.

6 *M. E. Union Church v. Pickett*, 19 N. Y. 482.

7 *Greene v. Dennis*, 6 Conn. 292; *De Witt v. Hastings*, 8 Jones & S. 463; 69 N. Y. 518; *Bow v. Allentown*, 34 N. H. 365.

8 *Jones v. Dana*, 24 Barb. 335; and see *People v. Phoenix Bank*, 24 Wend. 431; *President etc. v. Thompson*, 20 Ill. 137.

9 *U. S. Bank v. Stearns*, 15 Wend. 314; *Duncan v. Dubois*, 3 Johns. Cas. 125; and see *Hays v. Northwestern Bank*, 9 Grant. 127; *Covington Drawbridge Co. v. Shepherd*, 20 How. 227.

10 *Wood v. Jefferson County Bank*, 9 Cowen. 194; and see *Bank of Wilmington v. Woolaston*, 3 Har. (Del.) 50; *Howell v. Ruggles*, 5 N. Y. 444.

11 *U. S. Bank v. Stearns*, 15 Wend. 314. Compare *Palme v. Lake Erie etc. R. R. Co.* 31 Ind. 310; *Grant v. Henry Clay Co.* 80 Pa. St. 208; *State v. Carr*, 5 N. H. 367; *U. S. Rev. Stat.* § 505.

12 *Soc. for Prop. of Gospel v. Young*, 2 N. H. 310; *Nat. Bank v. De Bernales*, 1 Car. & P. 560.

13 *Vawter v. Franklin College*, 53 Ind. 83; *Duke v. Cahawba Nav. Co.* 10 Ala. 82; *Wellersburg etc. Plank R. Co.* 6 Md. 437.

DOONE CORP.—20.

14 *Spring Valley Water Works v. San Francisco*, 22 Cal. 434; *Jackson v. Leggett*, 7 Wend. 377; *Chamberlin v. Huguenot Manuf. Co.* 118 Mass. 332.

15 See *New York Car Oil Co. v. Richmond*, 10 Abb. Pr. 185; 6 Bosw. 213; *Eastern Plank R. Co. v. Vaughan*, 14 N. Y. 548; *Meriden Tool Co. v. Morgan*, 1 Abb. N. C. 123; *Mokelumne etc. Min. Co. v. Woodbury*, 14 Cal. 424; *Howes v. Anglo-Saxon Petroleum Co.* 101 Mass. 335; *Indianapolis etc. Min. Co. v. Merkimar*, 46 Ind. 142; *First Nat. Bank v. Davies*, 43 Iowa, 424; *Hughes v. Antietam Manuf. Co.* 34 Md. 316.

16 *Wilmington etc. R. R. Co. v. Saunders*, 3 Jones' L. 126; *Barrett v. Mead*, 10 Allen, 337; *Buffalo etc. R. R. Co. v. Cary*, 26 N. Y. 75; *Londonderry v. Andover*, 28 Vt. 416; *Commonw. v. Bakeman*, 105 Mass. 55, 56.

17 *Greene v. Dennis*, 6 Conn. 392.

18 *De Witt v. Hastings*, 8 Jones & S. 463; 69 N. Y. 518. See *ante*, chap. 3, ORGANIZATION.

§ 155. *Remedy by mandamus.*—Originally, mandamus was a high prerogative and remedial writ,¹ the appropriate functions of which were the enforcement of duties to the public, by officers and others, who either neglected or refused to perform them.² The functions of the writ are substantially the same in modern practice;³ but the right to the writ, and the power to issue it, no longer depend on any prerogative power,⁴ and the proceeding to secure its benefits is now regarded as nothing more than an ordinary action at law.⁵ It is in general the proper method of compelling the performance of an official duty.⁶ If there is a plain duty to be performed by an officer,⁷ board,⁸ municipal corporation,⁹ or private corporation,¹⁰ and there is no discretion to be exercised in its performance,¹¹ and there is no other specific or adequate remedy,¹² a mandamus is the appropriate remedy to command its performance in favor of the party injured by its non-performance;¹³ nor is a positive refusal to perform the duty enjoined necessary.¹⁴ If there is unreasonable delay, and a clear intention not to perform, it is sufficient to authorize a mandamus.¹⁵ Private corporations may invoke the aid of a mandamus under the same circumstances that would entitle an individual to the remedy.¹⁶

1 *Rex v. Barker*, 3 Burr. 1265; *Rex v. Severn etc. Railw. Co.* 2 Barn. & Ald. 646; *People v. Collins*, 19 Wend. 56, 65; *Dunklin County v. District Court*, 23 Mo. 449.

- 2 *Commonw. v. Alleghany County*, 37 Pa. St. 277.
- 3 See *Commonw. v. Pittsburg*, 34 Pa. St. 496; *Ex parte Turner*, 5 Ohio. 542; *American Asylum v. Phoenix Bank*, 4 Conn. 172; 10 Am. Dec. 112; *Sikes v. Ransom*, 6 Johns. 279; *State v. Guerrero*, 12 Nev. 163; *Runion v. Latimer*, 6 So. Car. 128.
- 4 *Commonw. v. Dennison*, 24 How. 66; *State v. Kirkley*, 29 Md. 85; *State v. Lanley*, 7 Iowa, 3-0.
- 5 *Gilman v. Bassett*, 33 Conn. 298; *City of Ottawa v. People*, 49 Ill. 240; *Chamberlaine v. Warburton*, 1 Utah, 257; *People v. Board of Police*, 25 N. Y. 316; *Commonw. v. Dennison*, 24 How. 66.
- 6 *City of Keokuk v. Merriam*, 44 Iowa, 432. Mandamus is never used simply as a preventive remedy: *Legg v. Mayor etc.* 42 Md. 203.
- 7 *Goodwin v. Glazer*, 10 Cal. 333; *People v. Miner*, 37 Barb. 466; *Kendall v. United States*, 12 Peters, 524; *Reg. v. Fox*, 3 Ad. & E. N. S. 246; *Rodgers v. Alexander*, 35 Tex. 116.
- 8 *Carroll v. Board of Police*, 28 Miss. 33; *Mount Moriah Cem. Assoc.* 81 Pa. St. 235; 23 Am. R. 743; *Farman v. Comm'rs*, 21 Ohio St. 311; *People v. Board of Education*, 18 Mich. 400; *People v. Contracting Board*, 46 Barb. 254.
- 9 *Walkley v. Muscatine*, 6 Wall. 481; *People v. Common Council*, 43 Barb. 473; *Coy v. City of Lyons*, 17 Iowa, 1; *Stockton R. R. Co. v. Stockton*, 51 Cal. 328; *Galena v. Amy*, 5 Wall. 705.
- 10 *Habersham v. Canal Co.* 26 Ga. 665; *People v. Pacif. Mail etc. Co.* 50 Barb. 280; 3 Abb. Pr. N. S. 364; *Norris v. Irish Land Co.* 8 El. & L. 512, 523.
- 11 *People v. Sexton*, 37 Cal. 532; *Fulton v. Hanna*, 40 Id. 278; *Mayor etc. v. Balmwater*, 47 Miss. 547; *People v. Green*, 62 N. Y. 624; 3 Hun. 755; *State v. Board of Education*, 24 Wis. 683; *Press Assoc. v. Nichols*, 45 Vt. 7; *Swan v. Gray*, 44 Miss. 33; *People v. Loucks*, 24 Cal. 68; *Ex parte Harris*, 52 Ala. 87; *State v. Van Ness*, 15 Fla. 317; *People v. Leonard*, 74 N. Y. 443.
- 12 *Rex v. Nottingham Waterworks*, 6 Ad. & E. 355; *Bush v. Beavan*, 1 Hurl. & C. 500; *Fitch v. McDiarmid*, 26 Ark. 482; *State v. McCrillus*, 4 Kan. 250; *Arrington v. Van Houton*, 44 Ala. 284; *Commonw. v. Rosseter*, 2 Binn. 360; 15 Am. Dec. 451; *Crandall v. Amador*, 20 Cal. 72; *Overseers v. Overseers*, 83 Pa. St. 279; *State v. Guerrero*, 12 Nev. 163; *Peck v. Booth*, 43 Conn. 270; *Tyler v. Taylor*, 29 Gratt. 765; *People v. Supervisors*, 36 Mich. 377; *State v. Herron*, 29 La. An. 848.
- 13 *Cleveland v. Board of Finance*, 38 N. J. L. 259; *Union Pacif. Railw. Co. v. Hall*, 91 U. S. 343; *Linden v. Case*, 46 Cal. 171; *People v. Supervisors etc.* 64 N. Y. 600; *People v. Common Council*, 78 N. Y. 33; 34 Am. R. 500.
- 14 *Cleveland v. Board of Finance*, 38 N. J. L. 259.
- 15 *Cleveland v. Board of Finance*, 38 N. J. L. 259; *State v. Rahway*, 33 Id. 110; and see *Reg. v. Bristol etc. Railw. Co.* 4 Q. B. 162; *Rex v. Wilts etc. Canal Co.* 3 Ad. & E. 477.
- 16 *Reg. v. Wing*, 17 Q. B. 645; *Chicago etc. R. R. Co. v. People*, 58 Ill. 363; *State v. Southern Minn. Railw. Co.* 18 Minn. 40; *Houston etc. Railw. Co. v. Commissioner*, 36 Tex. 332; *American Railw. Frog Co. v. Haven*, 101 Mass. 378; 3 Am. R. 377; *Insurance Co. v. Mayor etc.* 23 Md. 296; *Kilgus v. Johnson Co.* 6 Wall. 166; *Reg. v. Midland etc. Railw. Co.* 15 L. R. C. L. 525.

§ 156. Mandamus against public corporations.
Mandamus will lie against public corporations and their

officers, to compel the performance of any duty clearly enjoined upon them by law, and not left discretionary with them.¹ Thus, it lies to compel a city to levy and collect a tax where it is the clear duty of the city to do so.² So, it lies to compel county authorities to levy a tax to raise funds for the payment of an unquestioned debt;³ or to compel a county to issue its bonds in payment of a subscription to the capital stock of a corporation;⁴ or to compel an officer of a city to execute and deliver the city bonds to the relator;⁵ or to compel a municipal officer to submit his books of account to officers authorized to inspect them;⁶ or to compel town authorities to maintain bridges as required by statute;⁷ or to compel a common council to proceed with the opening of a street,⁸ or to issue precepts for the collection of an assessment for city improvements;⁹ or to compel collectors of cities to pay over taxes collected, as required by law;¹⁰ or to compel a municipal corporation to carry out the stipulations of a contract, in respect to payment for work done for it.¹¹ In England, mandamus lies to compel a municipal corporation to elect a new mayor,¹² and other corporate officers.¹³ So, in this country, it lies to compel a common council to hold a meeting to appoint corporate officers;¹⁴ or to compel municipal councils to perform their duties as canvassers and judges of the result of municipal elections.¹⁵ So, it will lie to compel the proper officers to give notice of an election for municipal officers, to be held after the charter day;¹⁶ or to compel them to admit to the possession of his place, one duly elected to a municipal office;¹⁷ and it will lie to compel the proper officer of a city to issue a license to one entitled to it.¹⁸ Boards of public officers generally, may, in proper cases, be compelled by mandamus to perform a plain legal duty.¹⁹ Thus, it will lie to compel a county board to construct a jail;²⁰ to compel a school board, on behalf of a father, to admit his child to the public schools,²¹ or to compel trustees to admit colored persons

to the public schools, where separate schools are not provided for them;²² to compel a contracting board to accept a bid for keeping in repair a public work;²³ or to compel the managers of a cemetery to permit the burial of persons entitled to sepulture therein.²⁴ The federal courts may by mandamus compel officers of a municipal corporation created by the state, to levy a municipal tax, when the state law authorizes it to be laid;²⁵ but not to levy a tax or do any other act not authorized by the laws of the state.²⁶ A mandamus does not confer power, but merely enforces the exercise of power already existing, when its exercise is a duty.²⁷

1 *Ottawa v. People*, 43 Ill. 233; *State v. Cincinnati*, 19 Ohio, 178; *Hall v. Selectmen etc.*, 39 N. H. 511; *People v. Mayor etc.*, 10 Wend. 393; *Pumpfrey v. Mayor etc.*, 47 Md. 145; 23 Am. R. 446.

2 *State v. Milwaukee*, 25 Wis. 122; *Darlington v. Mayor etc.*, 31 N. Y. 164; *Commonw. v. Pittsburg*, 34 Pa. St. 46; *State v. Mayor etc.*, 23 La. An. 353; *Chapin v. Osborn*, 29 Ind. 99; *Lexington v. Mulliken*, 7 Gray, 280; *Von Hoffman v. Quincy*, 4 Wall. 535; *Walkley v. Muscatine*, 6 Id. 481; *Ex parte Parsons*, 1 Hughes, 282.

3 *Pegram v. Cleveland County*, 64 No. Car. 557; *Elmore County v. Long*, 52 Ala. 277; *English v. Supervisors etc.*, 19 Cal. 172; *State v. Commissioners etc.*, 6 Neb. 454; *Commonw. v. Alleghany County*, 27 Pa. St. 277; *Columbia County v. King*, 13 Fla. 451; *Weber v. Lee County*, 6 Wall. 210; *Knox County v. Aspinwall*, 24 How. 376.

4 *Napa Valley R. R. Co. v. Napa Co.*, 30 Cal. 435; *Atchison etc. R. R. Co. v. Commissioners*, 12 Kan. 127; *Platt v. People*, 29 Ill. 54; and see *Morgan v. Commonw.*, 55 Pa. St. 456.

5 *People v. Brennan*, 39 Barb. 651.

6 *Keokuk v. Merriam*, 44 Iowa, 432. See *People v. Walker*, 9 Mich. 328; *People v. Mott*, 1 How. Pr. 247; *Bates v. Plymouth*, 14 Gray, 163; *Ferry v. Williams*, 12 Vroom, 333; 32 Am. R. 219.

7 *Ottawa v. People*, 43 Ill. 233. Compare *State v. Commissioners etc.*, 31 Ohio St. 211; *Howe v. Crawford Co.*, 47 Pa. St. 361; *In Re Municipality etc.*, 12 Up. Can. Q. B. 522.

8 *People v. Common Council*, 20 How. Pr. 491. The city council of a city may be compelled by mandamus to maintain a toll-ferry as authorized by law: *Att.-Gen. v. Boston*, 123 Mass. 450.

9 *Chapin v. Osborn*, 29 Ind. 99; see *Michigan City v. Roberts*, 34 Id. 471; *Uniontown v. Commonw.*, 34 Pa. St. 223.

10 *People v. Laws*, 33 Barb. 53; *State v. Hammell*, 31 N. J. L. 446.

11 *State v. Mayor etc.*, 27 La. An. 863; and see *Commonw. v. Perkins*, 43 Pa. St. 400; *Brown v. Crego*, 32 Iowa, 493.

12 *Rex v. Cambridge*, 4 Burr. 2608.

13 *Reg. v. Pembroke*, 8 Dowl. P. O. 302; *Reg. v. Leeds*, 7 Ad. & E. 963; *Rex v. Norwich*, 1 Barn. & Adol. 310.

14 *Att.-Gen. v. City Council*, 111 Mass. 90; *Lamb v. Lynd*, 44 Pa. St. 334; *Kerr v. Trego*, 47 Id. 632.

15 *Lamb v. Lynd*, 44 Pa. St. 336. See *State v. Rahway*, 33 N. J. L. 111; *State v. Fitzgerald*, 44 Mo. 426; *People v. Salomon*, 48 Ill. 415; *O'Farrell v. Colby*, 2 Minn. 190; *Pompert v. Lithgow*, 1 Bush, 176.

16 *People v. Fairburg*, 61 Ill. 140; see *State v. Tolson*, 33 N. J. L. 195.

17 *State v. Rahway*, 33 N. J. L. 111.

18 *Hall v. Supervisors etc.*, 20 Cal. 591; *East St. Louis v. Wider*, 46 Ill. 351; and see *Thomas v. Armstrong*, 7 Cal. 286.

19 See *People v. Supervisors etc.*, 67 N. Y. 330; *People v. Contracting Board*, 27 Ill. 378; *State v. Commissioners*, 6 Neb. 454; *Cleveland v. Board of Finance*, 38 N. J. L. 239; *State v. Harris*, 17 Ohio St. 608; *People v. Board of Police*, 76 N. Y. 33.

20 *People v. Board of Supervisors*, 84 Ill. 303; 25 Am. R. 461.

21 *People v. Board of Education*, 18 Mich. 400; *Trustees v. People*, 87 Ill. 303; 25 Am. R. 55.

22 *State v. Duffy*, 7 Nev. 342; 8 Am. R. 713.

23 *People v. Contracting Board*, 46 Barb. 254.

24 *Mt. Moriah Cem. Assoc. v. Commonw.*, 81 Pa. St. 235; 22 Am. R. 743; *Copper's Case*, 7 Abb. N. C. 121.

25 *Britton v. Platte City*, 2 Dill. 1; *Ex parte Parsons*, 1 Hughes, 282; *Supervisors v. United States*, 18 Wall. 71; *Loan Assoc. v. Topeka*, 20 id. 653.

26 *Vance v. Little Rock*, 30 Ark. 435; and see *Barkley v. Levee Commissioners*, 93 U. S. 258.

27 *United States v. County of Clark*, 95 U. S. 769. See *People v. Kelley*, 76 N. Y. 478.

§ 157. Mandamus against private corporations.

If the charter or a general statute imposes a specific duty upon a corporation, either in terms or by fair and reasonable construction and implication, mandamus is the proper method of compelling the performance of the duty, if there is no other specific or adequate remedy.¹ Thus, a mandamus may be awarded to compel a corporation to keep a register, and to insert therein the names of the stockholders;² to compel the exhibition of the books, records, etc., of the corporation, when the exercise of such power is necessary to protect the interests of stockholders;³ to compel the holding of an election for directors of a company, which has been omitted on the day designated;⁴ to compel a company to swear in one as director who has been lawfully elected;⁵ to compel the admission as members, of those entitled to become such;⁶ to compel the restoration to membership of one wrongfully expelled;⁷ or to compel the trustees of a religious society to admit a minister duly appointed;⁸ or to restore

a pastor who was removed contrary to the mode prescribed by the constitution of the society;⁹ or to restore bank directors who have been refused the exercise of their rights as directors;¹⁰ or to compel the committee of a school district to reinstate a teacher removed by them.¹¹ So, mandamus lies to compel a gas company to furnish gas to one entitled to it under their charter;¹² to compel a dock company to maintain a channel as required by their charter;¹³ to compel a railroad company to deliver to a particular warehouse or grain elevator, grain consigned thereto in bulk;¹⁴ or to carry its passengers to a particular terminus;¹⁵ or to compel the replacement of a track taken up in violation of its charter;¹⁶ or to compel it to so grade its track as to make the crossings practically convenient and useful;¹⁷ or to construct its road across streams so as not to interfere with navigation;¹⁸ or to compel it to construct and maintain fences and cattle-guards, as required by law;¹⁹ or to compel the assessment of damages of lands taken by right of eminent domain;²⁰ and it was awarded to compel a railway company to operate its road over a bridge in the same general manner that it operated the other portions of the road;²¹ and corporate bodies have been compelled by mandamus to construct and maintain bridges over streams, in accordance with their charters, and to maintain crossings over public highways.²²

1 *State v. Railroad Co.* 27 Conn. 533; *State v. Southern Minn. R. R. Co.* 14 Minn. 49; *State v. McIver*, 2 So. Car. 25; *Mobile etc. R. R. Co. v. Wisdom*, 5 Heisk. 125; *Canal etc. Comm'rs v. Willamette Transp. Co.* 6 Oreg. 219; *People v. Saratoga etc. R. R. Co.* 2 Am. L. J. 153; 7 West. L. J. 153; *Rex v. Nottingham Water Works*, 6 Ad. & E. 355. Corporations may be compelled to exercise their functions according to law by mandamus, although the party has another remedy against them by action for neglect of duty: *Buck v. Lockport*, 6 Lans. 251.

2 *Norris v. Irish Land Co.* 8 El. & B. 525.

3 *In re Sage*, 70 N. Y. 220, 223; *State v. Goll*, 3 Vroom, 235; *People v. Lake Shore etc. R. R. Co.* 11 Hun. 1; *St. Luke's Church v. Slack*, 7 Cush. 226; *In re Burton*, 31 Law J. Q. B. 62. Compare *Rex v. Merchants' etc. Co.* 2 Barn. & Adol. 115.

4 *People v. Cummings*, 72 N. Y. 433.

5 *Anon.* 1 Strange, 636.

6 *Rex v. March*, 2 Burr. 999; *DaCosta v. Russia Co.* 2 Strange, 782; *People v. Medical Society of Erie*, 25 How. Pr. 333; 32 N. Y. 157.

7 *State v. Georgia Med. Soc.* 33 Ga. 606; *Evans v. Philadelphia Club*, 50 Pa. St. 107; *Roehlen v. Aid Soc.* 22 Mich. 86. Compare *State v. Milwaukee etc.* 47 Wis. 671.

8 *People v. Steele*, 2 Barb. 397; *Rex v. Barker*, 1 Black. W. 300; 3 Burr. 125. But see *People v. Dikeman*, 7 How. Pr. 124; *Union Church v. Saunders*, 4 Am. Law Reg. 378; *Runkel v. Winne Miller*, 4 Har. & M. 430.

9 *Weber v. Zimmerman*, 22 Md. 156.

10 *Prieur v. Commercial Bank*, 7 La. 509; and see *Ex parte Wiley*, 54 Ala. 226.

11 *Gilman v. Bassett*, 33 Conn. 298.

12 *People v. Manhattan Gas Light Co.* 30 How. Pr. 87; S. C. 45 Barb. 136.

13 *Reg. v. Bristol Dock Co.* 2 Q. B. 64. Compare *Rex v. Jeyes*, 3 Ad. & E. 416.

14 *Chicago etc. R. R. Co. v. People*, 56 Ill. 365.

15 *State v. Hartford etc. R. R. Co.* 29 Conn. 538.

16 *King v. Severn etc. Railw. Co.* 2 Barn. & Adol. 644.

17 *Chicago etc. R. R. Co. v. People*, 56 Ill. 365; *People v. Duchess etc. R. R. Co.* 53 N. Y. 152; N. Y. Cent. etc. R. R. Co. v. *People*, 12 Hun, 195; 74 N. Y. 302.

18 *State v. Northern Railw. Co.* 9 Rich. 247.

19 *People v. Rochester etc. R. R. Co.* 14 Hun. 371.

20 *Queen v. Deptford Pier Co.* 8 Ad. & E. 910; *Queen v. Eastern Counties Railw. Co.* 2 Ad. & E. N. S. 347. See *People v. Curves*, 16 Ill. 547; *State v. Keokua*, 9 Iowa, 433.

21 *United States v. Union Pacif. R. R. Co.* 4 Dill. 479.

22 *People v. Troy etc. R. R. Co.* 37 How. Pr. 427; *State v. Halliday*, 8 N. J. L. 252; *State v. Gorham*, 37 Me. 461; *Habersham v. Canal Co.* 26 Ga. 635; *Locomotive Works v. Erie R. R. Co.* 20 N. J. Eq. 379; *Indianapolis etc. R. R. Co. v. State*, 37 Ind. 439.

§ 158. **Mandamus upon the petition of a corporation.**—A mandamus will issue on the application of a corporation to compel the performance of a duty, in which it has an interest, imposed by law upon an individual officer, or other corporation, the performance of which duty is neglected or refused.¹ Or a corporation may invoke the aid of a mandamus, where it is essential to justice in the way of securing the benefits of its charter, or the due and proper observance of the laws in relation to its organization;² as where a minority of the stockholders, by the use of illegal votes, have usurped powers that do not belong to them, and have deprived the majority of its power to govern.³ A corporation may, by this process, compel the surrender of its books by a public officer after

resignation;⁴ or may compel the commissioner of a land office to issue a certificate for lands to which the corporation is entitled;⁵ or compel county authorities to levy a tax to satisfy a judgment rendered on bonds issued by a county as provided by law.⁶ And generally, a corporation is entitled to the remedy by mandamus in cases where it would be granted on the application of an individual.⁷

1 See *Atchison etc. R. R. Co. v. Commissioners*, 12 Kan. 127; *Indianapolis etc. R. R. Co. v. State*, 37 Ind. 489; *Am. Railway Frog Co. v. Haven*, 101 Mass. 398; 3 Am. R. 377.

2 *Am. Railway Frog Co. v. Haven*, 101 Mass. 398; 3 Am. R. 377.

3 *Am. Railway Frog Co. v. Haven*, 101 Mass. 398; 3 Am. R. 377; and see *St. Luke's Church v. Slack*, 7 Cush. 226.

4 *City of Keokuk v. Merriam*, 44 Iowa, 432; and see *Kimball v. Lamprey*, 19 N. H. 215; *King v. Round*, 4 Ad. & E. 139.

5 *Houston etc. Railw. Co. v. Commissioners*, 36 Tex. 382. But compare *Galveston etc. Railw. Co. v. Gross*, 47 Tex. 428.

6 *Supervisors v. Durant*, 9 Wall. 736; and see *Palmer v. Stacy*, 44 Iowa, 340; *Boro v. Phillips County*, 4 Dill. 216; *Flagg v. Palmyra*, 33 Mo. 440.

7 *Am. Railw. Frog Co. v. Haven*, 101 Mass. 398; 3 Am. R. 377.

§ 159. When mandamus should not be granted. A mandamus will not be allowed either in favor of or against corporations, where the ordinary legal processes afford an adequate remedy, or there is a specific remedy provided by statute.¹ And it will be granted only to enforce an ascertained right, or to compel the performance of a recognized duty;² if the law authorize a corporation to act in its discretion, a mandamus will not lie to compel it to act,³ nor will it lie to revise the exercise of a discretionary power.⁴ It does not lie to compel trustees of a corporation to issue certificates of stock;⁵ nor to compel the transfer of stock upon the company's books;⁶ in such cases the parties have an adequate remedy by action.⁷ Nor does it lie to enforce obligations arising upon contract merely, and involving no trust;⁸ as, for instance, to compel a corporation to issue its bonds to one of its creditors, in order to obtain the benefit of a mortgage security.⁹ Nor will a mandamus in general lie to put at issue the title to an office;¹⁰ but the fact that the question of title to office is

incidentally involved, will not necessarily prevent the allowance of the writ.¹¹ It will not lie to compel the performance of an unlawful act,¹² or an act prohibited by an injunction;¹³ nor will it be granted where the performance of the act is physically impossible;¹⁴ or to command an officer to do what is not within his power to do, although he has put it out of his power to do his duty;¹⁵ or to compel the payment of an unliquidated demand;¹⁶ or to compel the performance of an act which would be fruitless;¹⁷ or to prevent an anticipated failure of duty.¹⁸ It will not lie to compel the mayor of a city to perform a duty which belongs solely to its common council;¹⁹ nor to compel a city council to admit an alleged member elect;²⁰ nor in Illinois, to compel a railway company to institute proceedings to condemn lands, whereof it has possession;²¹ nor, in New York, to restore a corporator, who has been expelled from a religious corporation, for moral delinquency;²² nor, in Iowa, to compel county authorities to strike out an assessment alleged to be erroneous.²³ And an attempt by the federal courts to compel by mandamus the levy of a tax not authorized by the laws of the state, would be an abuse of the writ.²⁴

1 *Tarver v. Commissioners*, 17 Ala. 527; *Cincinnati etc. R. R. Co. v. Commissioners*, 1 Ohio St. 77; *People v. Supervisors*, 12 Barb. 217; *People v. Saratoga etc. R. R. Co.* 2 Am. L. J. 188; *Rex v. Nottingham Waterworks*, 6 Ad. & E. 355.

2 *People v. Brooklyn*, 1 Wend. 318; 19 Am. Dec. 502; *People v. Supervisors*, 64 N. Y. 600; *People v. Supervisors*, 36 Mich. 371; *People v. Head*, 25 Ill. 325; *State v. Herron*, 23 La. An. 848.

3 *Turnp. Road v. Sandusky County*, 1 Ohio St. 149; *East Boston Ferry Co. v. Boston*, 101 Mass. 483; and see *Auditorial Board v. Hendrick*, 20 Tex. 60; *State v. Police Jury*, 27 La. An. 146; *Magco v. Supervisors*, 10 Cal. 370; *Ex parte Black*, 1 Ohio St. 30; *People v. Fairchild*, 67 N. Y. 234; *Rex v. Bristol Dock Co.* 6 Barn. & C. 181.

4 *State v. Fire Commissioners*, 26 Ohio St. 24.

5 *State v. Guerrero*, 12 Nev. 105.

6 *Kimball v. Union Water Co.* 44 Cal. 173; 13 Am. R. 157; *Murray v. Stevens*, 110 Mass. 95; *Shipley v. Mechanics' Bank*, 10 Johns. 484. But see *Bailey v. Strohecker*, 38 Ga. 259.

7 *Ex parte Fireman's Ins. Co.* 6 Hill, 243; *State v. Guerrero*, 12 Nev. 105.

8 *Parrott v. Bridgeport*, 44 Conn. 180; *State v. Zanesville etc. Co.* 16 Ohio St. 303; *State v. Republican River Bridge Co.* 20 Kan. 404.

9 *Ham v. Toledo R. R. Co.* 23 Ohio St. 174.

10 *People v. Stevens*, 5 Hill, 616; *Bonner v. State*, 7 Ga. 473; *State v. Johnson*, 23 La. An. 399; *Brown v. Turner*, 70 No. Car. 93; *Matter of Gardner*, 68 N. Y. 467; *People v. New York*, 3 Johns. Cas. 79; *Meredith v. Supervisors*, 50 Cal. 433; *Denver v. Hobart*, 10 Nev. 23.

11 *O'Donnel v. Dushman*, 30 N. J. L. 677.

12 *Ross v. Lane*, 11 Miss. 635; *People v. Fowler*, 55 N. Y. 232.

13 *Ex parte Fleming*, 4 Hill, 581; *Railroad Co. v. Wyandot Co.* 7 Ohio St. 278.

14 *Ball v. Lappius*, 3 Oreg. 55; *Ackerman v. Desha Co.* 27 Ark. 457; *Sliverthorn v. Warren Railw. Co.* 33 N. J. L. 173; *State v. Ferine*, 34 id. 254; *State v. Police Jury*, 23 La. An. 611.

15 *Rice v. Walker*, 44 Iowa, 458; and see *O'Brien v. Tallman*, 36 Mich. 13.

16 *People v. Common Council*, 34 Mich. 201; and see *Haygood v. Justices etc.* 19 Ga. 57.

17 *Commonwealth v. Supervisors*, 29 Pa. St. 121; and see *Ex parte Paine*, 1 Hill, 655.

18 *State v. Dubuclet*, 24 La. An. 16; *State v. Carney*, 3 Kan. 68. Mandamus will not lie to compel approval of official bond; *Ex parte Harris*, 32 Ala. 57; 23 Am. R. 559.

19 *State v. Shreveport*, 29 La. An. 658.

20 *Hildreth v. Heath*, 1 Ill. App. 82.

21 *Smith v. Chicago etc. R. R. Co.* 67 Ill. 191.

22 *People v. German etc. Church*, 53 N. Y. 103. See also *State v. Hebrew Cong.* 30 La. An. 205; 33 Am. R. 217.

23 *Meyer v. County of Dubuque etc.* 43 Iowa, 592; and see *Foster v. Redfield*, 50 Vt. 285.

24 *United States v. New Orleans*, 2 Wood, 230; *Vance v. Little Rock*, 30 Ark. 438; and see § 158, *ante*.

§ 160. To whom the mandamus should be addressed.—If the mandamus is issued to enforce the performance of an act by the whole corporation, the writ should be addressed to the whole corporation¹ by its proper name.² If the act is to be done by a select body, the writ should be directed to that body,³ and the direction should include those only whose duty it is to obey the command.⁴ A writ of mandamus directed to the wrong persons may be superseded.⁵ A mandamus to compel the production of the corporate records may, in general, be addressed to the officer having charge of the records.⁶ Under "an act to compel transfer agents of foreign corporations to exhibit a list of the stockholders thereof," a mandamus to compel the exhibition of the transfer books should be directed to the transfer agents only.⁷ Several persons constituting but one officer, and claiming

in the same right, may prosecute the same writ of mandamus;⁸ but separate and distinct rights cannot be included in the same writ, as, for instance, to restore several persons to office in the same corporation;⁹ nor can one and the same writ be addressed to the officers of different corporations, commanding the performance of distinct duties arising out of distinct liabilities.¹⁰

1 Rex v. Abingdon, 1 Ld. Raym. 560; Rex v. Cambridge, 4 Burr. 2008, 2011; Rex v. Smith, 538. See also Reg. v. Ledgard, 1 Ad. & E. N. 8. 61f; Mayor etc. v. Reg. 10 Id. 571; Rex v. Mayor etc. 6 Ad. & E. 349.

2 Rex v. Taylor, 3 Salk. 231; Rex v. West Looe, 3 Barn. & C. 677, 685.

3 Rex v. Smith, 2 Maule & S. 598; and see People v. Common Council, 45 Barb. 473; 3 Abb. Ct. App. 502; 1 Abb. Pr. N. S. 318; People v. Common Council, 20 How. Pr. 491; Commonwealth v. Select and Common Councils, 34 Pa. St. 434.

4 Pees v. Mayor etc. 1 Strange, 640; Rex v. Wigan, 2 Burr. 782.

5 Rex v. Mayor etc. 2 Salk. 699; 1 Ld. Raym. 560; Reg. v. Ipswich, 2 Salk. 435.

6 People v. Throop, 12 Wend. 183. Compare City of Keokuk v. Merriam, 44 Iowa, 432.

7 People v. Lake Shore etc. R. R. Co. 11 Hun, 1.

8 Scott v. Morgan, 8 Dowl. 328; Rex v. Montacute, 1 Black. W. 60.

9 Anon. 2 Salk. 436; Smith v. Erb, 4 Gill. 437.

10 State v. Township Committees, 5 Halst. 292.

§ 161. Nature of remedy by quo warranto.—A writ of quo warranto was an ancient remedy at common law against one who had usurped an office, or unlawfully claimed and exercised a franchise of the crown;¹ and to inquire by what authority he supported his claim or exercised the right.² It was also granted in case of non-user, or misuser, or abuse of a franchise,³ commanding the respondent to show by what warrant he exercised it.⁴ The ancient writ of quo warranto is now obsolete, and an information in the nature of quo warranto has been substituted in its place.⁵ This information is in form criminal,⁷ but it has for a long time been applied to the mere purpose of trying the civil right, seizing the franchise, or ousting the wrongful possessor of an office.⁸ Proceedings in the nature of quo warranto, as authorized by statute in the different states, have in view substantially the same purpose, namely, the correction of usurp-

ations in office, or the abuse of corporate franchises.⁹ And where the words "writ of quo warranto" are used, they are generally to be regarded as synonymous with the words "information in the nature of quo warranto."¹⁰ In New York the writ of quo warranto and the information in the nature of a quo warranto are abolished,¹¹ and an action in the nature of a quo warranto has been substituted therefor.¹² This action is essentially a civil writ,¹³ and it is one of legal, not equitable, cognizance;¹⁴ and the issues therein are strictly legal ones.¹⁵ So, in some of the other states the information in the nature of a quo warranto is to be regarded as a civil proceeding, subject to the rules applicable to corresponding proceedings in strictly civil causes.¹⁶

1 3 Bl. Com. 262; *Rex v. Trelawney*, 3 Burr. 1616; *State v. St. Louis etc. Ins. Co.* 8 Mo. 330; *People v. Pease*, 30 Barb. 588; 27 N. Y. 45.

2 3 Bl. Com. 262; *Commonw. v. Union Ins. Co.* 5 Mass. 230; *Ex parte Att.-Gen.* 1 Cal. 85.

3 *State v. Ashley*, 1 Ark. 279; *Commonw. v. Small*, 26 Pa. St. 31.

4 *Commonw. v. Small*, 26 Pa. St. 31.

5 3 Bl. Com. 262; *Att.-Gen. v. Utica Ins. Co.* 15 Johns. 358.

6 *State v. Ashley*, 1 Ark. 279; *Respublica v. Griffiths*, 2 Dall. 112; *People v. Richardson*, 4 Cowen, 102 n.; *Com. v. Murray*, 11 Serg. & R. 73; 14 Am. Dec. 614.

7 See *Att.-Gen. v. Utica Ins. Co.* 2 Johns. Ch. 371; *Donnelly*, 11 Ill. 552; *Robinson v. Jones*, 14 Fla. 256.

8 *Commercial Bank v. State*, 4 Smedes & M. 439; *Att.-Gen. v. Tudor Ice Co.* 104 Mass. 239; *Att.-Gen. v. Utica Ins. Co.* 15 Johns. 358; 8 Am. Dec. 243; *Hyde v. State*, 52 Miss. 665; *Ensminger v. People*, 47 Ill. 384; *Newsom v. Cocke*, 44 Miss. 352; 7 Am. R. 686; *Rex v. Francis*, 3 Term Rep. 484.

9 *People v. Bank of Hudson*, 6 Cowen, 217; *State v. Paterson etc. Turnp. Co.* 1 Zab. 9; *State v. Independent School District*, 2 Iowa, 264; *State v. Johnson*, 26 Ark. 281; *State v. Stone*, 25 Mo. 535; *Boston etc. R. R. Co. v. Midland R. R. Co.* 1 Gray, 340; *State v. Smith*, 32 Ind. 213; *State v. Barron*, 57 N. H. 498.

10 *State v. West Wisconsin Rallw. Co.* 34 Wis. 197; *Att.-Gen. v. Utica Ins. Co.* 2 Johns. Ch. 371; and see *Murphy v. Farmers' Bank*, 20 Pa. St. 415; *State v. Gleason*, 12 Fla. 190. The writ of quo warranto is not known in Tennessee practice: *Hyde v. Trewwhitt*, 7 Cold. 59.

11 Code of Civ. Proc. § 1983.

12 Code of Civ. Proc. § 1983; and see *People v. Cook*, 8 N. Y. 67; *People v. Loomis*, 8 Wend. 396; 24 Am. Dec. 33; *People v. Livingston*, 60 N. Y. 66.

13 *People v. Clute*, 52 N. Y. 576; *People v. Cook*, 8 Id. 67.

14 *People v. Clute*, 52 N. Y. 576.

15 *People v. Clute*, 52 N. Y. 576. See also *Owen v. Whitaker*, 20 N. J. Eq. 122; *Att.-Gen. v. Tudor Ice Co.* 104 Mass. 239.

16 See *State v. Messmore*, 14 Wis. 115; *State v. Kupferle*, 44 Mo. 154; *State v. Price*, 50 Ala. 568.

§ 162. When quo warranto lies in corporation cases.—At common law, quo warranto is the proper remedy where there is a corporate body *de facto*, who assume to act as a corporation, but from some defect in their constitution, they cannot legally use the powers they affect to use.¹ It lies in general against a corporation, for any cause of seizure or dissolution.² It lies in case of nonfeasance or malfeasance, abuse of power, or misuse of privilege, by a corporation.³ It lies to inquire into the election or admission of an officer or member of a corporation;⁴ or in the case of an intrusion into an office created by the charter of a corporation.⁵ It is the proper remedy against persons usurping the office of trustees of an incorporated church;⁶ and it lies to test the right of a member of the common council of a city to a seat in that body.⁷ It lies against a corporation for carrying on banking operations without authority;⁸ against persons usurping the office of directors of a corporation;⁹ or against trustees of a college, for usurping the franchise of establishing a branch in another place;¹⁰ or against trustees of a village, holding over, who have neglected to call an election for the choice of their successors.¹¹ So, it lies against persons assuming to act as school trustees of a district, claimed by them to be legally organized, to test the question as to the legal existence of such district.¹² And the question whether a town has been legally erected may be tested in an action in the nature of quo warranto, against one claiming to exercise the office of supervisor.¹³ And in case of an invasion of the right to preside over the meetings of a city council, the remedy is by quo warranto, or information in that nature.¹⁴

1 *Smith's Case*, 4 Mod. 57; *Rex v. Pasmore*, 3 Term Rep. 199; *People v. Kingston etc. Turnp. Co.* 23 Wend. 193; *Turnp. Co. v. State*, 3 Wall. 210; *State v. Moore*, 19 Ala. 514; *Parish of Bellport v. Tooker*, 29 Barb. 256, 266; 21 N. Y. 267.

2 *People v. Bristol etc. Turnp. Co.* 23 Wend. 222; and see *Att.-Gen. v. Petersburg etc. R. R. Co.* 6 Ired. 450; *State v. Essex Bank*, 8 Vt. 429; *Vernon Soc. v. Hills*, 6 Cowen, 23; *Commonw. v. Commercial Bank*, 28 Pa. St. 383.

3 *Terrett v. Taylor*, 9 Cranch, 43; *People v. Manhattan Co.* 9 Wend. 351; *Reed v. Cumberland etc. Canal Corp.* 65 Me. 132; *People v. Thompson*, 21 Wend. 235; 23 Id. 537; *Commonw. v. Insurance Co.* 5 Mass. 230; *Commonw. v. Lexington etc. Turnp. Co.* 6 B. Mon. 397; and see *De Camp v. Alward*, 52 Ind. 468; *Re Franklin Tel. Co.* 119 Mass. 447.

4 *State v. Lehre*, 7 Rich. 234; *Smith v. State Bank*, 18 Ind. 327; *Terry v. Stauffer*, 17 La. An. 306; *Grant v. Chambers*, 34 Tex. 573; *People v. Scannell*, 7 Cal. 492; *State v. Harris*, 3 Ark. 570; *People v. New York*, 3 Johns. Cas. 79; *Matter of Hebra etc.* 7 Hun, 333; *Reg. v. Leeds*, 11 Ad. & E. 512.

5 *People v. Kip*, 4 Cowen, 382 n.; *Lindsey v. Att.-Gen.* 33 Miss. 509; *People v. De Mill*, 15 Mich. 164; *State v. Buchanan, Wright*, 233; *Rex v. Warlow*, 2 Maule & S. 75; *Miller v. English*, 1 Zab. 317; *Com. v. Arrison*, 15 Serg. & R. 127; 16 Am. Dec. 531. But it must appear that the intruder has been in the actual possession of the office; *Rex v. Whitwell*, 5 Term Rep. 85; *People v. McCullough*, 11 Abb. Pr. N. S. 129. And quo warranto will not lie after the term of office has expired; *State v. Jacobs*, 17 Ohio, 143. Compare also *People v. Thompson*, 16 Wend. 655; *Queen v. Quayle*, 11 Ad. & E. 508; *Queen v. Pepper*, 7 Id. 745.

6 *Commonw. v. Graham*, 64 Pa. St. 339.

7 *Commonw. v. Meesser*, 44 Pa. St. 341.

8 *People v. Utica Ins. Co.* 15 Johns. 358; 8 Am. Dec. 243. See also *State v. Kill Buck Turnp. Co.* 38 Ind. 71.

9 *People v. Tibbetts*, 4 Cowen, 358.

10 *People v. Geneva College*, 5 Wend. 211.

11 *People v. Bartlett*, 6 Wend. 422.

12 *Renwick v. Hall*, 84 Ill. 162; and compare *State v. Independent School District*, 29 Iowa, 264.

13 *People v. Carpenter*, 24 N. Y. 86; and compare *State v. Coffee*, 50 Mo. 59.

14 *Cochran v. McLeary*, 22 Iowa, 75.

§ 163. When quo warranto does not lie.—Quo warranto will not lie against one claiming office in a supposed corporation, where no corporation in fact exists;¹ nor will it lie against an officer of a private corporation, who is a mere servant or agent, holding at the will of the directors;² nor will it be allowed to try the title to an office, merely because of an irregularity in the election, in the absence of bad faith, and where the result of the election has not been affected.³ And it will not lie because of the use by a corporation of an abbreviation of its corporate name.⁴ An information in the nature of quo warranto will not lie against a corporation for taking land without making compensation, as provided by stat-

ute;⁵ nor will it lie to annul a city ordinance passed in the irregular and improper exercise of a power conferred by law;⁶ nor to declare the election of persons as directors who received a minority of the votes cast, although it appear that the judges improperly rejected sufficient legal votes offered to give a majority.⁷ In England, if the franchise in no way concerns the public, the information will be denied.⁸

1 *State v. Lehre*, 7 Rich. 234; and see *People v. Thompson*, 16 Wend. 653.

2 *People v. Hills*, 1 Laus. 202; and see *Darby v. The Queen*, 12 Clark & F. 820.

3 *Queen v. Ward*, Law R. 8 Q. B. 210; *Reg. v. Collins*, 23 Week. R. 225; and compare *State v. Tolan*, 33 N. J. L. 196.

4 *People v. Bogart*, 45 Cal. 73.

5 *People v. Turnpike Co.* 2 Johns. 190; and compare *People v. Whitcomb*, 35 Ill. 172; *State v. Kingan*, 51 Ind. 142; *State v. Shields*, 56 Id. 521.

6 *State v. City of Lyons*, 31 Iowa, 432.

7 *State v. McDaniel*, 22 Ohio St. 354. Compare *State v. Marston*, 6 Kan. 524; *Pitts v. Bonner*, 7 Ga. 449; *People v. Van Slyck*, 4 Cowp. 297; *People v. Holden*, 23 Cal. 123; *State v. Marlow*, 15 Ohio St. 114.

8 *Rex v. Shepherd*, 4 Term Rep. 381; *Rex v. Dawbeny*, 2 Strange, 1196; *Reg. v. Mousley*, 8 Ad. & E. 957.

§ 164. Who may institute quo warranto proceedings. If the injury is one that affects the whole community alike, the proceedings are to be instituted by the state, through its appointed agencies.¹ Thus, if it is sought to arrest a usurpation of the franchise of a municipal corporation, the right to file an information is in the state, and the institution of the proceedings is a matter in the discretion of the attorney-general;² and private individuals who have no interest other than as citizens, residents, and tax-payers, cannot maintain the proceedings against such corporation.³ So, individuals may not file, even by leave of court, a writ of quo warranto to dissolve a corporation.⁴ But as it respects the administration of corporate functions, or duties touching mere individual rights, such as the election or admission of a corporate officer or member, the writ may issue either at the suit of the attorney-general, or of any person interested in prose-

cuting the writ.⁵ Persons claiming different offices cannot, however, unite as relators in the same quo warranto proceeding, to test thereby their rights to the respective offices against adverse parties.⁶ In early practice, the court always exercised a sound discretion in granting or withholding leave to file an information in the nature of a quo warranto;⁷ and in modern practice, it is still necessary to apply for leave to file such an information, when the relator is a private person.⁸ In such case it is within the discretion of the court to grant or refuse the writ, according to circumstances;⁹ if the circumstances are such as tend to throw suspicion on the motives of the relator, the court will require additional affidavits, or will refuse the application, if the consequence will be to dissolve the corporation.¹⁰ But the attorney-general may, of his own authority, and without application for leave of court, file an information *ex officio*,¹¹ either against persons assuming to act as a corporation, to compel them to show title to the franchise,¹² or against an individual in possession of a corporate office, to compel him to show his right.¹³ If the information by the attorney-general states that it was filed at the relation of any one, the statement will be regarded as surplusage, and will not vitiate the proceeding.¹⁴ In New York, in an action in the nature of a quo warranto, brought by the attorney-general against a usurper, the name of the relator who claims the office should be joined as plaintiff.¹⁵ Where a statutory provision allows a proceeding by information for the unlawful exercise of a franchise, such information can be filed only by the prosecuting attorney, or by a person, on his own relation, who has an interest in the franchise;¹⁶ the remedy of a person not interested, if any he has, is by injunction.¹⁷

1 Commonw. v. Farmers' Bank, 2 Grant Cas. 392; Miller v. Palermo, 12 Kan. 14; State v. Smith, 32 Ind. 213; Voisin v. Leche, 23 La. An. 25.

2 Robinson v. Jones, 14 Fla. 256.

3 Robinson v. Jones, 14 Fla. 256; and see Commonw. v. Phila. etc. R. R. Co. 20 Pa. St. 518; Wright v. People, 15 Ill. 417.

4 *State v. Paterson etc.* Turnp. Co. 1 Zab. 9; *President etc. v. McConaby*, 16 Serg. & R. 144; *Houston v. Nense River Nav. Co.* 8 Jones, (N. C.) 478; *Rex v. Ogden*, 10 Barn. & C. 230; *Commonw. v. Burrell*, 7 Pa. St. 24. Compare *Boston etc. R. R. Co. v. Midland R. R. Co.* 1 Gray, 240.

5 *Murphy v. Farmers' Bank*, 20 Pa. St. 415; *State v. Commercial Bank*, 6 Simedes & M. 218; *Commonw. v. Insurance Co.* 5 Mass. 230; *Parker v. Smith*, 3 Minn. 240; *State v. Paterson etc.* Turnp. Co. 1 Zab. 9.

6 *People v. DeMill*, 15 Mich. 164. Compare *Rex v. Warlow*, 2 Maule & S. 75.

7 *People v. Sweeting*, 2 Johns. 184; *Rex v. Sargent*, 5 Term Rep. 467; *People v. Walte*, 70 Ill. 25; *Commonw. v. Reigert*, 14 Serg. & R. 216.

8 *People v. Tisdale*, 1 Dong. (Mich.) 59; *Republica v. Griffiths*, 1 Dall. 112; *Commonw. v. Arrison*, 15 Serg. & R. 127; 16 Am. Dec. 531.

9 *State v. Brown*, 5 R. I. 1; *Commonw. v. Jones*, 12 Pa. St. 365; *People v. Hillsdale etc.* Turnp. Co. 2 Johns. 150; *State v. Tolan*, 33 N. J. L. 165; *State v. Smith*, 48 Vt. 266.

10 *Rex v. Trevenen*, 2 Barn. & Ald. 479; and see *Rex v. Paine*, 2 Chit. 369; *Reg. v. Anderson*, 2 Ad. & E. N. S. 740; *Miller v. English*, 1 Zab. 217.

11 *Rex v. Trevenen*, 2 Barn. & Ald. 482; *Rex v. Ogden*, 10 Barn. & C. 230; *State v. Gleason*, 12 Fla. 190; *Att.-Gen. v. Delaware etc. R. R. Co.* 38 N. J. L. 282. Compare *Commonw. v. Cluly*, 56 Pa. St. 270.

12 *King v. Trevenen*, 2 Barn. & Ald. 482; *People v. Utica Ins. Co.* 15 Johns. 358; *King v. Clarke*, 1 East, 34, 43; *People v. Bank of Niagara*, 6 Cowen, 196. Compare *Rex v. Corp. of Carmarthen*, 2 Burr. 1869; *People v. Albany etc. R. R. Co.* 7 Abb. Pr. N. S. 265; 55 Barb. 344; 38 How. Fr. 228.

13 *King v. Trevenen*, 2 Barn. & Ald. 482; and compare *People v. Pratt*, 15 Mich. 184; *Patterson v. Hubbs*, 65 No. Car. 119.

14 *State v. City Council*, Mill. Const. 36; and see *People v. Knight*, 14 Mich. 230; *Commonw. v. Fowler*, 10 Mass. 290.

15 *People v. Ryder*, 12 N. Y. 433; *People v. Walker*, 2 Abb. Pr. 421; 23 Barb. 304.

16 *Miller v. Palermo*, 12 Kan. 14; *State v. Smith*, 32 Ind. 213; and see *Yonkey v. State*, 27 Ind. 236; *State v. Boal*, 46 Mo. 523.

17 *State v. Smith*, 32 Ind. 213.

§ 165. *Against whom quo warranto should be brought.*—A proceeding in quo warranto to procure the dissolution of a corporation, or to restrain it from the exercise of some franchise which it usurps,¹ or to enforce a forfeiture which it is alleged to have incurred,² is properly filed against the corporate body in its corporate name,³ and not merely against the individual members.⁴ But when the proceeding is instituted to oust defendants from acting as a corporation, and to inquire whether a corporation has been legally organized etc. the information should

be filed against the individuals.⁵ An information against the company, by its corporate name, admits its existence as a corporation.⁶

¹ *People v. Bristol, etc. Turnp. Co.* 23 Wend. 222; *State v. Coffee*, 50 Mo. 56.

² *People v. Bank of Hudson*, 6 Cowen, 217; *State v. Barron*, 57 N. H. 498.

³ *People v. Bank of Hudson*, 6 Cowen, 217.

⁴ *State v. Taylor*, 25 Ohio St. 280.

⁵ *People v. Saratoga etc. R. R. Co.* 15 Wend. 113; *State v. Cincinnati Gas Light Co.* 13 Ohio St. 262.

⁶ *People v. Saratoga etc. R. R. Co.* 15 Wend. 113; *Mud Creek Draining Co. v. State*, 43 Ind. 236.

§ 166. Defenses to quo warranto proceedings.

To an information in the nature of quo warranto, the defendant may set up as many defenses as he has.¹ A plea which sets forth the charter shows a *prima facie* defense to an information to dissolve a corporation.² The time within which the information would lie, at common law, was fixed at twenty years, beyond which the court would not disturb a peaceable possession of a franchise;³ and in every case within twenty years, whether the information would be granted or refused was discretionary with the court, under the particular circumstances of the case.⁴ The period of limitation has, in some cases, been fixed by statute;⁵ but in the absence of a statutory provision, lapse of time is no bar to an information when filed by the attorney-general.⁶ An action in the nature of a quo warranto will not lie to try the title to an office before the commencement of the term of office;⁷ nor will the court allow an information to be filed against an officer whose term of office will expire before the case can be tried;⁸ and an information to oust will not be granted until an actual motion from office has been made.⁹ Upon an information in the nature of quo warranto, the state is not bound to show anything, and the defendant must either disclaim or justify.¹⁰ The justification should be set up by plea and not by answer,¹¹ and his plea must show all the facts necessary to establish the lawful right

of the respondent to the office in question,¹² and must conclude with a verification.¹³ To an information charging individuals with claiming, using, and exercising the franchise of being a body corporate, it is sufficient for the defendant to deny the user of the alleged franchise, without denying the claim.¹⁴ If the defendant be charged with usurping an office, he may set up several titles thereto.¹⁵ The appearance of the defendant to an information, for any purpose other than to challenge the jurisdiction of the court, operates as a waiver of all defects in the summons.¹⁶ If the complaint avers facts sufficient to show a forfeiture of the defendants' corporate franchise, an answer which does not deny them cannot set up an excuse for the forfeiture.¹⁷ It is no answer to a quo warranto that there is a remedy by private action, or indictment,¹⁸ or that the charter also gives another remedy;¹⁹ nor is it any defense, that the company, pursuant to the charter, gave a special security for the fulfillment of the charter's conditions.²⁰ In New York, the position of the defendant, the rules of evidence, and the presumptions of law and fact, are the same in an action in the nature of a quo warranto as in the proceeding by writ or information, for which the remedy by action was substituted.²¹

1 *State v. Brown*, 34 Miss. 638; *People v. Stratton*, 23 Cal. 332.

2 *Att.-Gen. v. Mich. State Bank*, 2 Doug. (Mich.) 359.

3 *Winchelsea Causes*, 4 Burr. 1963; compare *Rex v. Powell*, 8 Mod. 165; *People v. Vail*, 20 Wend. 12; *People v. Oakland County Bank*, 1 Doug. (Mich.) 235.

4 *Winchelsea Causes*, 4 Burr. 1962; and see *State v. Lehre*, 7 Rich. 234; *State v. Brown* 5 R. I. 1.

5 See *Rex v. Brooks*, 8 Barn. & C. 321; *Reg. v. Francis*, 12 Eng. L. & Eq. 419; *State v. Beecher*, 16 Ohio, 362; *State v. Alexandria Soc.* 11 Id. 9.

6 *State v. Pawtuxet Turnp. Co.* 8 R. I. 521.

7 *People v. McCullough*, 11 Abb. Pr. N. S. 129.

8 *People v. Sweeting*, 2 Johns. 184; *State v. Jacobs*, 17 Ohio, 1433; *Commonw. v. Athearn*, 3 Mass. 285; *Morris v. Underwood*, 19 Ga. 559; *Commonw. v. Sparks*, 6 Whart. 416; *People v. Hartwell*, 12 Mich. 508; *Lacoste v. Duffy*, 49 Tex. 767; 30 Am. R. 122. But compare *Rex v. Payne*, 2 Chit. 367; *Reg. v. Hodson*, 4 Ad. & E. N. S. 648 n.; *People v. Hartwell*, 12 Mich. 538; *Commonw. v. Smith*, 45 Pa. St. 69; *Hunter v.*

Chandler, 45 Mo. 452; *Burton v. Patton*, 2 Jones' L. 124; *The Queen v. Blizard*, Law R. 2 Q. B. 55.

9 *Rex v. Mayor etc.* 3 Barn. & Ald. 590; *Rex v. Heaven*, 2 Term Rep. 772.

10 *People v. Utica Ins. Co.* 15 Johns. 358; *State v. Ashley*, 1 Ark. 553.

11 *People v. Percells*, 3 Gilm. 59.

12 *Att.-Gen. v. Foote*, 11 Wis. 14; *Clark v. People*, 15 Ill. 213; *People v. Thacher*, 55 N. Y. 525; 14 Am. R. 312; *Larke v. Crawford*, 28 Mich. 88; *Flynn v. Abbott*, 16 Cal. 358; *People v. Pease*, 27 N. Y. 63.

13 *State v. Tudor*, 5 Day, 330; *State v. Harris*, 3 Ark. 572; *State v. Gleason*, 12 Fla. 190; *Rex v. Jones*, 2 Strange, 1161.

14 *People v. Thompson*, 16 Wend. 655.

15 *State v. McDaniel*, 22 Ohio St. 354; *People v. Jones*, 18 Wend. 601.

16 *Kane v. People*, 4 Neb. 509.

17 *People v. Northern R. R. Co.* 53 Barb. 98; 42 N. Y. 217.

18 *People v. Bristol etc. Turnp. Co.* 23 Wend. 222.

19 *People v. Hillsdale etc. Turnp. Co.* 23 Wend. 254.

20 *Thompson v. People*, 23 Wend. 537.

21 *People v. Thacher*, 55 N. Y. 525; 14 Am. R. 312.

§ 167. Judgment in quo warranto proceedings.—

When the proofs in an information in the nature of a quo warranto show that individuals or a corporation are guilty, either of usurping or intruding into any office or franchise, or of unlawfully holding, a judgment of ouster is properly rendered;¹ but when the proceeding is against a corporation, and a cause of forfeiture is duly proved, judgment of ouster and of dissolution shall be rendered,² which is equivalent to judgment of seizure at common law.³ And the court has no discretion to refuse judgment of ouster in such case, on the ground that public or private interests will be better subserved by pressing the existence of the corporation.⁴ But the judgment must be confined to the seizure of the franchises,⁵ and if it extend to the seizure of the property of the corporation, that part of the judgment is erroneous.⁶ In quo warranto the court may give or withhold judgment, as justice may require;⁷ and it will decline to enter judgment, if the facts upon which the relator's right depends are obscurely stated.⁸ At common law the judgment, if for the respondent, is, that he be allowed his office or franchise.⁹ On default of the defendant, though the court may give judg-

ment of ouster against him, it cannot determine the right of the relator to the office.¹⁰ Neither party to an information in the nature of a quo warranto could recover costs at common law;¹¹ but statutes relative to costs have, in many instances, changed this rule.¹²

1 *People v. Hudson Bank*, 6 Cowen, 217; *State v. Ashley*, 1 Ark. 304; *Rex v. Hearle*, 1 Strange, 627; *Rex v. City of London*, cited in 2 Term Rep. 522; *Smith v. State*, 21 Ark. 294; *People v. Saratoga etc. R. R. Co.* 15 Wend. 113; *State v. Central Ohio etc. Assoc.* 29 Ohio St. 399.

2 *People v. Saratoga etc. R. R. Co.* 15 Wend. 113. And see *People v. Ravenswood etc. Bridge Co.* 20 Barb. 518.

3 See *Rex v. Hertford*, 1 Ld. Raym. 426; *State v. Ashley*, 1 Ark. 304; and see *Rex v. Amery*, 2 Term Rep. 567; *Commonw. v. Union Ins. Co.*

4 *State v. Penn'a etc. Canal Co.* 23 Ohio St. 121.

5 *Nevitt v. Bank of Port Gibson*, 6 Smedes & M. 568; *State v. Bank*, 1 Spear, 449.

6 *State Bank v. State*, 1 Blackf. 373.

7 *People v. Phillips*, 1 Denio, 338.

8 *People v. Phillips*, 1 Denio, 338.

9 3 Bl. Com. 263.

10 *People v. Connor*, 13 Mich. 238; and see *State v. Taylor*, 15 Ohio St. 137. But compare *Att.-Gen. v. Barstow*, 4 Wis. 567.

11 *Commonw. v. Woelper*, 3 Serg. & R. 52.

12 See *Rex v. McKay*, 5 Barn. & C. 641; *Queen v. Blizard*, Law R. 2 Q. B. 65; *State v. Cahawba*, 30 Ala. 66; *People v. Clute*, 53 N. Y. 576; *People v. Ballou*, 12 Wend. 277.

CHAPTER XIII.

EXECUTIONS.

- § 168. Execution at common law.
- § 169. Exemption of corporate franchise from execution.
- § 170. What property and interests liable to execution.
- § 171. Stock not liable to levy on execution.
- § 172. When receiver will be appointed.
- § 173. Who may be appointed receiver.
- § 174. Functions of receiver.
- § 175. Rights and duties of receiver.
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§ 168. Execution at common law.—It is an execution that gives effect to the judgment;¹ and at common law, all the property and pecuniary interests of the defendant are subject to levy and sale upon execution, in satisfaction of the judgment.² The right of the defendant to claim exemption for any portion of his property from execution, is the exception to the general rule, founded on statute.³ And the property of a corporation may be taken on execution and sold, for the payment of its debts, as in the case of an individual.⁴ After judgment duly recovered against a company, the remedy of the creditors to enforce payment is by execution, and not by mandamus;⁵ though it is well-settled that, in case of judgment against a municipal corporation, when there is no property subject to execution sufficient to satisfy the judgment, mandamus will lie to compel the levy and collection of the necessary tax for that purpose.⁶

¹ See *James v. Plank R. Co.* 8 Mich. 91; *Handy v. Dobbin*, 12 Johns. 229; *Canal Co. v. Bouham*, 9 Watts & S. 27.

² *Handy v. Dobbin*, 12 Johns. 229; *Penhallow v. Dwight*, 7 Mass. 24; *Hamill v. Gillespie*, 48 N. Y. 556.

³ *Twinam v. Swart*, 4 Lans. 263.

⁴ See *Pierce v. Partridge*, 3 Met. 44; *Maryland v. Bank of Maryland*, 6 Gill. & J. 219; *Boyd v. Chesapeake*, 17 Md. 195; *Slee v. Bloom*, 19 Johns. 456.

5 Reg. v. Victoria Park Co. 1 Ad. & E. N. S. 238. Compare State v. Clay Co. 46 Mo. 231; People v. Clark Co. 50 Ill. 213; Buck v. Lockport, 6 Lans. 231.

6 See § 156 *ante*; State v. Beloit, 20 Wis. 74; Galena v. Amy, 5 Wall. 705; Olney v. Harvey, 60 Ill. 463; Frank v. San Francisco, 21 Cal. 688.

§ 169. Exemption of corporate franchise from execution.—At common law, and in the absence of any special statutory provisions on the subject, the franchise of a corporation is not subject to execution, or to sale and transfer, even in payment of the corporate debts.¹ And it is held, that the property of corporations which is essential to their active operations, ought not to be subject to seizure for their debts;² but that creditors should proceed against them by sequestering their earnings, permitting them to continue their undertakings for the public convenience.³ And where a statute provides for the sale of the corporate franchise on execution, its provisions must be strictly pursued, or no title will pass by the sale.⁴ If the officer fail to give the notice required by statute, the sale will be void.⁵ And a sale which is illegal, because of non-compliance with the provisions of the statute, will not be rendered valid by acquiescence therein on the part of stockholders.⁶

1 Thomas v. Armstrong, 6 Cal. 280; Wood v. Turnpike Co. 24 Id. 474; Randolph v. Larned, 27 N. J. Eq. 557; Stewart v. Jones, 40 Mo. 140; Youngman v. Railroad Co. 65 Pa. St. 278. The franchise being an incorporeal hereditament, cannot, upon the settled principles of the common law, be seized on execution: Gue v. Canal Co. 24 How. 263; and see Arthur v. Commercial etc. Bank, 9 Smedes & M. 394.

2 See Foster v. Fowler, 60 Pa. St. 27; Wood v. Turnpike Co. 24 Cal. 478; Macon etc. Railw. Co. v. Parker, 9 Ga. 393.

3 Foster v. Fowler, 60 Pa. St. 27.

4 Gue v. Canal Co. 24 How. 257; Standford Bank v. Ferris, 17 Conn. 259. Compare Randolph v. Larned, 27 N. J. Eq. 557.

5 Howe v. Starkweather, 17 Mass. 240; and see Hammatt v. Wyman, 9 Mass. 138; State Bank v. Tutt, 44 Mo. 367.

6 James v. Plank R. Co. 8 Mich. 91; and compare Oakland Railw. Co. v. Keenan, 56 Pa. St. 198.

§ 170. What property and interests liable to execution.—The estate and interest of a corporation in real property, although it may be but an easement,¹ is subject to levy and sale on execution, as property dis-

tinguished from the franchise of the corporation.² In some of the states the rolling stock of a railroad corporation is deemed personal property, which can be levied on and sold as such under an execution against the company.³ But an opposite rule prevails in other states,⁴ and in some the matter has been determined by statute.⁵ The right of a foreign corporation to a deed from the sheriff of land bought by the corporation on execution is liable to attachment.⁶ And a deposit by a corporation in a bank is a debt by the bank to the corporation, which may be attached by a judgment creditor of the corporation.⁷ Money, bank-bills, or any evidences of debt issued by a moneyed corporation, may be taken on execution.⁸ And, as a general rule, a corporation is bound for its just debts on execution, whether the payment is made by a sale of property for that purpose, or with money from its vaults.⁹ The strictly private property of a municipal corporation, or property owned by it as a mere investment of funds,¹⁰ is liable to seizure on execution.¹¹ But taxes and revenues due to municipal corporations, whether in the treasury or in transit to it, cannot be seized under execution by a creditor of the corporation;¹² and so of property owned or used by the corporation for public purposes, such as buildings and property necessary to carry on water-works, and the like.¹³ And it was held that money received from the sale of tickets and collection of freights, and in possession of a station agent of a railway company, could not be attached by trustee process in a suit against the company by one of its creditors.¹⁴

¹ *Evangelical etc. Home v. Buffalo Hydraulic Assoc.* 4 Hun. 419; 64 N. Y. 561.

² *State v. Rives*, 5 Ired. 297; *Slee v. Bloom*, 19 Johns. 456, 475; *Goodrich v. Burbank*, 12 Allen, 459.

³ See *Dement v. Plattsburg etc. R. R. Co.* 47 Barb. 104; *Beardsley v. Ontario Bank*, 31 Id. 619; *Boston etc. R. R. Co. v. Gilmore*, 37 N. H. 419; *Strickland v. Parker*, 54 Me. 253; *Railroad Co. v. James*, 8 Wall. 159; *Coe v. Railroad Co.* 10 Ohio St. 373; *Hoyle v. Plattsburgh etc. R. R. Co.* 54 N. Y. 314; *Howe v. Freeman*, 14 Gray, 566; *Denniead v. Bank of Baltimore*, 9 Md. 179.

⁴ *Applegate v. Ernest*, 3 Bush, 649; *Covey v. Pittsburg etc. R. R. Co.* 100 Mo. 179.

Co. 3 Phila. 173; *Wood v. Turnpike Co.* 24 Cal. 473; *West Penn'a R. R. Co. v. Johnston*, 69 Pa. St. 230; *Titus v. Ginheimer*, 27 Ill. 462.

5 A rolling stock of any rail road company in Wisconsin is by statute made a fixture: see *Chicago etc. R. R. Co. v. Borough of Fort Edward*, 21 Wis. 41; and see *Miller v. Rutland etc. R. R. Co.*, 5 Vt. 432. The Constitution of Illinois fixes the character of rolling stock as personal property: Const. Ill. art. II, § 10. In Indiana it is treated as realty for taxable purposes: see *Louisville etc. R. R. Co. v. State*, 23 Ind. 177.

6 *Wright v. Douglass*, 2 N. Y. 373.

7 *Farmers' etc. Bank v. Ryan*, 64 Pa. St. 236. But compare *Carroll v. Cone*, 41 N. Y. 216; 40 Barb. 220.

8 *Turner v. Fendall*, 1 Cranch, 117; *Seymour v. Dascomb*, 12 Wend. 584; *Holmes v. Nuncaster*, 12 Johns. 395; and see *Spencer v. Blaisdell*, 4 N. H. 198; *Noble v. Kelly*, 40 N. Y. 415.

9 *Maryland v. Bank of Maryland*, 6 Gill & J. 205; and see *Van Dyke v. Besser*, 35 Ga. 173.

10 *New Orleans v. Ins. Co.* 23 La. An. 61.

11 *New Orleans v. Ins. Co.* 23 La. An. 61; *Davenport v. Ins. Co.* 17 Iowa. 276; *Louisville v. Commonw.* 1 Duval. 235; *Holliday v. Frisbie*, 15 Cal. 630. Compare *State v. Milwaukee*, 20 Wis. 57; *Commonw. v. Perkins*, 43 Pa. St. 400.

12 *Egerton v. Municipality etc.* 1 La. An. 435; and see *Railroad Co. v. Municipality etc.* 7 Id. 143.

13 *Foster v. Fowler*, 60 Pa. St. 27; *President etc. v. Indianapolis*, 12 Ind. 620; *Green v. Marks*, 24 Ill. 221; *Gooch v. Gregory*, 65 No. Car. 142.

14 *Pettingill v. Androscoggin R. R. Co.* 51 Me. 370. Compare *Everdell v. Sheboygan etc. R. R. Co.* 41 Wis. 395.

§ 171. Stock not liable to levy on execution.—

The levy and sale upon execution of shares in the stock of a corporation is not authorized at common law;¹ but in some of the states they have been expressly made liable to execution by statute.² If the act of incorporation provides a mode in which the shares of members may be attached and sold on execution, the general provision of a statute on the same subject is thereby superseded.³

1 *Denton v. Livingston*, 9 Johns. 96; *Denny v. Hamilton*, 16 Mass. 402; *Johns v. Johns*, 1 Ohio St. 350; *Ross v. Ross*, 25 Ga. 247; *Arnold v. Ruggles*, 1 R. I. 165.

2 See *Howe v. Starkweather*, 17 Mass. 240; *Iowa Code*, § 2967; *Toledo etc. R. R. Co. v. Reynolds*, 73 Ill. 457; *North Central R. R. Co. v. Rider*, 45 Md. 24; *Graw v. Memphis etc. R. R. Co.* 5 Cold. 434.

3 *Titecomb v. Union Ins. Co.* 8 Mass. 326. Compare *Martin v. Mobile etc. R. R. Co.* 7 Bush, 116. An officer of a corporation may be garnished for money or property of the company in his hands: *Everdell v. Sheboygan etc. R. R. Co.* 41 Wis. 395. Compare *Pettingill v. Androscoggin R. R. Co.* 51 Me. 370; *Graw v. Memphis etc. R. R. Co.* 5 Cold. 434. A balance due on a subscription to the stock of a corporation, may be attached the same as other debts: *Peterson v. Sinclair*, 83 Pa. St. 250.

§ 172. When receiver will be appointed.—The appointment of receivers over corporations, in proper cases, is not against public policy,¹ and is a common subject of statutory provisions and regulations.² And independent of statute, a court of general equity powers may appoint a receiver, where there are no persons authorized to take charge of the corporate property;³ or where fraud is shown in the defendant, and the fund is in danger of being wasted or misapplied;⁴ or to prevent the removal of the property beyond the jurisdiction of the court;⁵ or to take charge of and manage a railroad, when such a course is indispensable to secure the rights of the legitimate stockholders, and to prevent a failure of justice.⁶ And the fact that a charter specially authorizes the appointment of a receiver in a particular contingency, does not oust the ordinary jurisdiction of chancery to appoint a receiver.⁷ But receiverships should be granted with great caution, and only in cases of pressing apparent necessity;⁸ there must be a well-grounded apprehension of injury about to be done.⁹ And a court of equity has not power, by virtue of its general jurisdiction over corporate bodies, to dissolve the corporation, or to wind up its affairs and sequester the corporate property and effects, in the absence of express statutory authority.¹⁰ And where such power is specially delegated by statute, the provisions of the statute must be strictly pursued.¹¹ In case of a mortgage of tolls and income, and the earnings are being so applied as not to be legally applicable to reduce the incumbrance, a receiver may properly be appointed.¹² But the infidelity or misconduct of some, or all, of the trustees or managers, affords no ground for taking away the rights of the shareholders who constitute the company, either by dissolving it, or taking away its management, and placing it in the hands of an officer of the court;¹³ in such case, the principles of preventive justice go no farther than to enjoin the misconduct, or to remove the unfaithful officer.¹⁴ The proceeding to appoint a receiver

for the purpose of securing the application of the revenues and net profits of the corporate business, to the satisfaction of a judgment creditor, is usually a matter of statutory regulation.¹⁵ After the creditor has established his claim by a judgment at law, and execution is returned in whole or in part unsatisfied, he may file a bill on behalf of himself and other creditors, against the corporation and its delinquent stockholders, for an account of the assets and the appointment of a receiver.¹⁶

1 *State v. Central Railw. Co.* 18 Md. 193.

2 See *Att.-Gen. v. Ins. Co.* 4 Paige, 224; *Empire City Bank Case*, 18 N. Y. 199; *People v. Albany etc. R. R. Co.* 53 Barb. 344; 7 Abb. Pr. N. 8, 251; *Penn'a R. R. Co. v. Pemberton etc. R. R. Co.* 24 N. J. Eq. 38; *Bangs v. McIntosh*, 23 Barb. 51; *Covington Drawbridge Co. v. Shepherd*, 21 How. 112; *Bank Comm'rs v. Central Bank*, 5 R. 1, 12; *Ireland v. Nichols*, 37 How. Pr. 222. On whose application appointed: see *Kimball v. Goodburn*, 32 Mich. 10; *Kennedy v. St. Paul etc. R. R. Co.* 2 Dill. 448.

3 *Lawrence v. Greenwich Fire Ins. Co.* 1 Paige, 587; *Conro v. Port Henry Iron Co.* 4 How. Pr. 165.

4 *Podmore v. Gunning*, 5 Sim. 485; *Willis v. Corlies*, 2 Edw. Ch. 281; *Orphan Asylum v. McCartee*, 1 Hopk. Ch. 429.

5 *Sandford v. Sinclair*, 8 Paige, 373; *Conro v. Port Henry Iron Co.* 12 Barb. 27; *Gibbons v. Mainwaring*, 9 Sim. 77.

6 *Stevens v. Davison*, 18 Gratt. 819; *Ohio etc. R. R. Co. v. Davis*, 23 Ind. 553; *Newell v. Smith*, 41 Vt. 555; *Meyer v. Johnston*, 53 Ala. 257; *Cowdrey v. Galveston etc. R. R. Co.* 93 U. S. 352.

7 *Fripp v. Chard Railw.* 11 Hare, 241; 21 Eng. L. & Eq. 53. The regularity of the appointment of a receiver cannot be questioned collaterally, by any other tribunal than the one by which he was appointed: *Russell v. East Ang. Railw. Co.* 3 Macn. & G. 104; *Att.-Gen. v. Life Ins. Co.* 77 N. Y. 272.

8 *Patten v. Accessory Translt. Co.* 13 How. Pr. 502; 4 Abb. Pr. 235. Compare *Evans v. Coventry*, 5 DeGex M. & G. 911; *Owen v. Homan*, 4 H. L. Cas. 997.

9 *Kean v. Colt*, 1 Halst. Ch. 365.

10 See *Howe v. Deuel*, 43 Barb. 504; *Belmont v. Erie Railw. Co.* 53 Id. 637; *Neale v. Hill*, 15 Cal. 145; *Gaylord v. Fort Wayne etc. R. R. Co.* 6 Bliss, 296; *Baker v. Administrator etc.* 32 Ill. 79.

11 *Bangs v. McIntosh*, 23 Barb. 591.

12 *Ruggles v. Southern Minn. R. R. Co.* 17 Int. Rev. Rec. 29. Compare *Re Hammersmith Town Hall Co.* Law R. 6 Ch. Div. 112.

13 *Waterbury v. Merchants' Un. Ex. Co.* 50 Barb. 157.

14 *Waterbury v. Merchants' Un. Ex. Co.* 50 Barb. 157. Compare *Featherstone v. Cooke*, Law R. 16 Eq. 238; *Samuel v. Holladay*, Woolw. 400.

15 See *Covington Drawbridge Co. v. Shepherd*, 21 How. 112; *Mann v. Pentz*, 3 N. Y. 415; *Atlas Bank v. Nahant Bank*, 23 Pick. 480; *Bartlett v. Drew*, 60 Barb. 648; 4 Lans. 444; 57 N. Y. 587; *Osgood v. Maguire*, 61 Id. 524, 525.

16 *Adler v. Milwaukee etc. Manuf. Co.* 13 Wis. 57; *Ward v. Manuf. Co.* 16 Conn. 593; *Wood v. Drummer*, 3 Mas. (C. C.) 308; *Griffith v. Man'g*, 73 N. Y. 611; *Barlett v. Drew*, 57 Id. 537. Compare *Linch v. South Side It. R. Co.* 4 Thomp. & C. 224; 1 Hun, 636; *Galwey v. Sugar Ref. Co.* 36 Barb. 256; 13 Abb. Pr. 211; *Mills v. Stewart*, 62 Barb. 444.

§ 173. Who may be appointed receiver.—A receiver should be a strictly disinterested person, of unimpeachable honor and integrity, possessed of sufficient knowledge and ability to discharge his duties properly.¹ An officer or stockholder of an insolvent corporation is not a proper person to be appointed its receiver.² But on a voluntary dissolution of a corporation, its officers or stockholders may be appointed receivers.³ As a general rule, a trustee will not be appointed a receiver, if any other can be procured.⁴ And the attorney in the cause is absolutely disqualified from holding the position.⁵

1 *Fripp v. Chard Railw.* 11 Hare, 241; 21 Eng. L. & Eq. 53; *Smith v. Stage Co.* 18 Abb. Pr. 419; 28 How. Pr. 203; *Freeholders v. State Bank*, 28 N. J. Eq. 166.

2 *Att.-Gen. v. Bank of Columbia*, 1 Palge, 511; 4 Wend. 588; *Bank of Monroe v. Schermerhorn*, 1 Clarke Ch. 366.

3 *Matter of Eagle Iron Works*, 8 Palge, 385; *Matter of Bowery Bank*, 5 Abb. Pr. 415; 16 How. Pr. 56.

4 *Sutton v. Jones*, 15 Ves. 584.

5 *Baker v. Backus*, 32 Ill. 79.

§ 174. Functions of receiver.—The receiver is the officer of the court appointing him,¹ and his possession is the possession of the court.² He is entitled to the protection of the court while in the proper discharge of his duty,³ and persons interfering with him are guilty of contempt of court.⁴ The receiver of an insolvent corporation represents not only the company,⁵ but also the creditors and stockholders;⁶ and in his character as trustee for the latter, he may disaffirm and maintain an action as receiver to set aside illegal or fraudulent transfers of the property of the corporation made by its agents or officers, or to recover its funds or securities invested or misapplied.⁷ But he has no greater rights than the corporation he represents, and he cannot impeach or disaffirm its lawful and authorized acts.⁸ The receiver of a national bank duly appointed is an officer of the United States.⁹

1 Van Rensselaer v. Emery, 9 How. Pr. 135; Vermont etc. R. R. Co. v. Vt. etc. R. R. Co. 46 Vt. 732; Ross v. Williams, 11 Holak. 410; Battle v. Davis, 66 No. Car. 232; Ellicott v. Warford, 4 Md. 80.

2 Beverly v. Brooke, 4 Gratt. 187; Libby v. Rosekrans, 55 Barb. 302; Delany v. Mansfield, 1 Hogan, 234; Albany City Bank v. Schermerhorn, 9 Paige, 372.

3 Parker v. Browning, 6 Paige, 388; Newell v. Smith, 49 Vt. 255.

4 Clark v. Blininger, 11 Jones & S. 126, 344; Matter of Woven Tape Skirt Co. 12 Hun, 111; Vermont etc. R. R. Co. v. Vt. etc. R. R. Co. 46 Vt. 792.

5 Bell v. Shibley, 33 Barb. 610; New Orleans Gas Light Co. v. Bennett, 6 La. An. 457.

6 Gillet v. Moody, 3 N. Y. 479; and see Atchison v. Davidson, 2 Pinn. (Wis.) 48; Lafayette Bank v. Buckingham, 12 Ohio St. 419.

7 Att.-Gen. v. Life Ins. Co. 77 N. Y. 372; and see Van Cott v. Van Brunt, 2 Abb. N. C. 283.

8 Devendorf v. Beardsley, 23 Barb. 656; Hyde v. Lynde, 4 N. Y. 397; and see Moise v. Chapman, 24 Ga. 243; Safford v. People, 85 Ill. 538; Lincoln v. Fitch, 42 Mo. 456.

9 Platte v. Beach, 2 Ben. 303.

§ 175. Rights and duties of receiver.—The general rights and duties of a receiver are derived from the order appointing him, and the course and practice of the court.¹ It is his duty to act in all things with a view to the equitable rights of the parties interested, and to protect the property intrusted to him to the best of his ability.² In case of doubt he should obtain the direction of the court.³ In equity, the receiver becomes vested with the power to possess himself of the personal property covered by the receivership without the necessity of an assignment;⁴ though it may be otherwise at law.⁵ The order of appointment is *per se* a sequestration, conferring upon the receiver the necessary means of enforcing his rights.⁶ But real estate becomes vested in the receiver only by virtue of a conveyance to him.⁷ An assignment to a receiver passes the rights and property of the corporation precisely in the same plight and condition, and subject to the same equities, as they were held by the corporation.⁸ By virtue of their general powers, receivers have authority to sue for all moneys due the corporation, and for all property improperly disposed of in violation of the rights of either creditors or stockholders, for the purpose of paying the debts and dividing the surplus, if any, among the stockholders.⁹

The duty of calling in the unpaid stock to discharge debts, devolves upon the receiver.¹⁰ He may be allowed to compromise disputed claims against the company, or to submit them to arbitration.¹¹ But he cannot waive a defense,¹² nor allow a claim against a corporation which could not have been recovered against it, either at law or in equity.¹³ He is the proper person to bring a suit to enforce payment of a debt due the company,¹⁴ and he can sue for torts committed before his appointment.¹⁵ And he may maintain an action outside the jurisdiction of the court which appointed him.¹⁶ He should make all the assignments and do all lawful acts in his own name, and not in the name or under the seal of the corporation.¹⁷ As it respects the disposition of money in his hands, it is simply his duty to pay nothing out without an order of the court;¹⁸ and he should see that every item of expenditure was fully justified by the order.¹⁹ The mere possession by receivers of the obligations of the company, will not discharge them.²⁰ Irregularities in the appointment of a receiver cannot be shown to impeach his title to the corporate assets;²¹ and they constitute no ground of defense to an action brought by him on a note owned by the corporation.²²

1 *Verplanck v. Mercantile Ins. Co.* 2 Paige, 436; 1 Edw. Ch. 84; *Seymour v. Wilson*, 16 Barb. 294.

2 *Iddings v. Bruen*, 4 Sand. Ch. 417; *Corey v. Long*, 12 Abb. Pr. N. S. 427; *Ohio etc. R. R. Co. v. Davis*, 23 Ind. 533.

3 *Lottimer v. Lord*, 4 E. D. Smith, 183.

4 *Matter of Eagle Iron Works*, 8 Paige, 386; *Chautauqua Co. Bank v. Risley*, 19 N. Y. 361; and see *Bidlock v. Mason*, 26 N. J. Eq. 30; *Fralley v. Central Fire Ins. Co.* 9 Phila. 219; *McIlvath v. Sinore*, 22 Minn. 391.

5 *Mann v. Pentz*, 2 Sand. Ch. 257.

6 *Rutten v. Tallis*, 5 Sand. 610.

7 *Walker v. White*, 36 Barb. 592; *Chautauqua Co. Bank v. Risley*, 19 N. Y. 329; and see *Simpkins v. Gold Co.* 50 How. Pr. 56.

8 *Receiver v. Patterson Gas Light Co.* 3 Zab. 283. Compare *Berry v. Brett*, 6 Bosw. 627; *Clarke v. Hawkins*, 5 R. I. 219; *Jones v. Robinson*, 26 Barb. 310; *Coit v. Brown*, 12 Gray, 233.

9 *Osgood v. Laytin*, 48 Barb. 463. See *Osgood v. Laytin*, 5 Abb. Pr. N. S. 1; *Vall v. Hamilton*, 20 Hun, 355.

10 *Hightower v. Thornton*, 8 Ga. 496; and see *Pentz v. Hawley*, 1 Barb. Ch. 122. The receiver must show a clear legal right to institute and carry on a suit against a stockholder, to recover an unpaid sub-

scription: *Chandler v. Keith*, 42 Iowa, 39. And see *Stillman v. Dougherty*, 44 Md. 280.

11 *Matter of Croton Ins. Co.* 3 Barb. Ch. 642. Authority to compromise demands against individual stockholders on their subscriptions, will not be conferred on a receiver: *Chandler v. Brown*, 77 Ill. 334.

12 *McEvers v. Lawrence*, Hoff. Ch. 172.

13 *Att.-Gen. v. Insurance Co.* 4 Paige, 234; *Evans v. Insurance Co.* 9 Allen, 329.

14 *Gillet v. Fairchild*, 4 Denio, 80; *Nathan v. Whitlock*, 9 Paige, 132; *Bank of Niagara v. Johnson*, 8 Wend. 643.

15 *Brouwer v. Hill*, 1 Sand. 629.

16 *Hoyt v. Thompson*, 5 N. Y. 320. Compare *Barclay v. Quicksilver Min. Co.* 6 Lans. 25.

17 *Hoyt v. Thompson*, 5 N. Y. 320.

18 *Fletcher v. Dodd*, 1 Ves. 85. Compare *Att.-Gen. v. Vigor*, 11 Ves. 563.

19 *Brown v. New York etc. R. R. Co.* 19 How. Pr. 84. As to authority to sell assets: see *Randolph v. Larned*, 27 N. J. Eq. 557.

20 *Liquidator etc. v. Brown*, 21 La. An. 248.

21 *Vermont etc. R. R. Co. v. Vt. etc. R. R. Co.* 46 Vt. 702; and see *Battershall v. Davis*, 31 Barb. 323; *Russell v. East Aug. Railw.* 3 Macn. & G. 125.

22 *Case v. Marchand*, 23 La. An. 60.

§ 176 General liabilities of receiver.—In all matters relating to the trust fund, the receiver acts at his peril.¹ He has a right, at any time, to apply to the court for instructions as to his duties under the orders of the court;² and he will not be exonerated from any loss that may arise from his neglect and mismanagement.³ For his indiscretion or abuse of the fund he will be held answerable,⁴ and his sureties must respond to any inability on his part, or for his delinquency in paying any unauthorized or unreasonable demands.⁵ He has no authority to bring an action of ejectment without leave of the court;⁶ and, as a general rule, if he defends actions, or does any other acts which may involve the estate in expense, without first applying to the court for leave, it is at his own risk as to costs.⁷ A receiver appointed to operate and manage a railroad, is the agent of the power appointing him,⁸ and, like all public agents, he is liable only for his own wrongful acts or delinquencies,⁹ and not for acts done in the legitimate business of the agency.¹⁰ But if the receivers of a railroad are, in fact, common

carriers, it is no defense to an action for breach of duty or obligation that they were managing the road as receivers.¹¹ The attorneys, solicitors, or counsel of the several parties, are bound in duty to their clients to watch the proceedings of the receiver, and to see that he faithfully discharges the duties of his trust.¹² If he abuse the trust, or squander the fund, he may be removed or restrained by the court.¹³ And when a company is being wound up voluntarily under the supervision of the court, the liquidators appointed by the company may be removed by the court in its discretion, if, in view of all the circumstances, their removal is deemed more conducive to the efficient winding up of the company.¹⁴

1 Devendorf v. Dickenson, 21 How. Pr. 275.

2 Curtis v. Leavitt, 1 Abb. Pr. 274; 10 How. Pr. 481; Matter of Van Allen, 37 Barb. 225.

3 Iddings v. Bruen, 4 Sand. Ch. 417.

4 Matter of Stafford, 11 Barb. 353; Lansing v. Lansing, 1 Abb. Pr. N. S. 280; 43 Barb. 182.

5 Devendorf v. Dickenson, 21 How. Pr. 275.

6 Matter of Merritt, 16 Wend. 405; 5 Paige, 125.

7 Anonymous, 6 Ves. 287; Utica Ins. Co. v. Lynch, 2 Barb. Ch. 573.

8 Camp v. Barney, 4 Hun. 373, 377; Kain v. Smith, 11 Id. 552; Hopkins v. Connell, 2 Tenn. Ch. 323.

9 Hopkins v. Connell, 2 Tenn. Ch. 323.

10 Camp v. Barney, 4 Hun. 373; and see Cardot v. Barney, 63 N. Y. 281.

11 Newell v. Smith, 49 Vt. 255; Paige v. Smith, 99 Mass. 385; Cowdrey v. Galveston etc. R. R. Co. 53 U. S. 352; Re Long Branch etc. R. R. Co. 24 N. J. Eq. 338; Meyer v. Johnston, 53 Ala. 237; Blumenthal v. Branerd, 38 Vt. 402.

12 Ryckman v. Parkins, 5 Paige, 544; Corey v. Long, 12 Abb. Pr. N. S. 427.

13 Matter of Bowery Bank, 5 Abb. Pr. 415; 16 How. Pr. 56.

14 Re Marselles Extension Railw. etc. Co. Law R. 4 Eq. 692. Compare Lottimer v. Lord, 4 E. D. Smith 183; Wiswell v. Starr, 50 Me. 381; Morris v. Thomas, 17 Ill. 112; State v. Claypool, 13 Ohio St. 14.

CHAPTER XIV.

MORTGAGES OF CORPORATE PROPERTY.

- § 177. Power to make.
- § 178. What property included in mortgage.
- § 179. Mortgage of corporate franchises.
- § 180. Mortgage of future acquisitions.
- § 181. Form, execution, etc., of mortgage.
- § 182. Power of a corporation to take a mortgage.
- § 183. Priority of liens.
- § 184. Enforcement of mortgage.

§ 177. Power to make.—In order to carry out the corporate objects, a corporation may borrow money,¹ and may execute a mortgage upon the corporate property, real and personal, to secure the payment.² So, a power to purchase lands necessary and convenient for the prosecution of the works of a corporation, and to dispose of the same,³ implies a power to mortgage them to secure the debts of the company.⁴ And a power to mortgage for a particular purpose, conferred by a special provision in the charter, does not abridge the general power to execute a mortgage for the security of creditors.⁵ A mortgage to secure demands for materials and labor in erecting a building, is valid under a power to mortgage land of the society for the purpose of building thereon.⁶ The defect of lack of power to mortgage the corporate property may be cured by subsequent recognition and ratification on the part of the legislature.⁷ But the legislature has no power to confirm the fraudulent sale of the mortgaged property of a corporation;⁸ or to enact a law impairing the obligation of the contract between the mortgagors and the mortgagees.⁹ A mortgage given by a corporation to secure *bona fide* holders of its bonds, will be sustained, although the resolution authorizing its execution was

passed outside of the limits of the state.¹⁰ But a corporation cannot pledge its own stock to a person for a loan of money, and afterward, upon the strength and faith of the stock so pledged, assent to a mortgage to another creditor upon all its property, to be first applied to the payment of the mortgage, without security to the pledgee of the stock.¹¹ Nor is the lender of money to a corporation affected by a misappropriation of the funds by the officers of the corporation, if he took no part in the fraud;¹² and such misappropriation is no defense to an action for the recovery of the money.¹³

1 Union Min. Co. v. Rocky Mt. Nat. Bank, 2 Colo. 248; Beers v. Phoenix Glass Co. 14 Barb. 353; Darnes v. Ontario Bank, 13 N. Y. 132.

2 Barry v. Merch. Exchange Co. 1 Sand. Ch. 290; Richards v. Merrimack etc. R. R. Co. 44 N. H. 127; Covington v. Covington etc. Bridge Co. 10 Bush. 69; Thompson v. Lambert, 44 Iowa, 239; Burt v. Kattle, 21 Ohio St. 116; Bridge Co. v. General Ins. Co. 3 Md. 305; Burr v. McDonnell, 3 Gratt. 206; and compare Steamship Co. v. Mounsey, 4 Kay & J. 733; Re Patent File Co. Law R. 6 Ch. 83.

3 Gordon v. Preston, 1 Watts, 335; Watts' Appeal, 78 Pa. St. 370; Adams v. Railroad Co. 2 Coldw. 645; Braham v. San José, 24 Cal. 535.

4 Gordon v. Preston, 1 Watts, 335; Jackson v. Brown, 5 Wend. 590; Taber v. Cin. R. R. Co. 15 Ind. 433; McAllister v. Plant, 54 Miss. 106.

5 Mobile etc. R. R. Co. v. Talman, 15 Ala. 472; Allen v. Montgomery R. R. Co. 11 Ill. 435; and see Wright v. Bundy, 11 Ind. 398. Compare Fairlie v. Gilbert, 2 Term Rep. 169.

6 Miller v. Chance, 3 Edw. Ch. 290; and compare Commissioners etc. v. Atlantic etc. R. R. Co. 77 No. Car. 289; West v. Agr. Board, 83 Ill. 203; Aurora Agr. etc. Soc. v. Paddock, 80 Id. 253.

7 Shaw v. Norfolk R. R. Co. 5 Gray, 162; Portland etc. R. R. Co. v. Kennebec etc. R. R. Co. 59 Me. 9; Richards v. Merrimack etc. R. R. Co. 44 N. H. 127; and see Elwell v. Grand St. etc. R. R. Co. 67 Barb. 83.

8 White Mt. R. R. v. White Mt. R. R. 50 N. H. 50.

9 Martin v. Somerville Co. 3 Wall. Jr. 206; and compare Have-meyer v. Iowa County, 3 Wall. 294.

10 Galveston R. R. v. Cowdrey, 11 Wall. 459.

11 Vall v. Hamilton, 20 Hun, 335.

12 Thompson v. Lambert, 44 Iowa, 239.

13 Thompson v. Lambert, 44 Iowa, 239.

§ 178. What property included in mortgage.—A mortgage of real estate will pass all the fixtures on the premises.¹ In general, the mortgage will include such articles as are essential to the use of the realty, have been applied exclusively to use in connection with it, are necessary for that purpose, and without which, or similar

articles, the realty would cease to be of value.³ And it has been held that the rolling-stock of railways,⁴ rails, ties, chairs, spikes, and all other property brought upon the realty, if intended to be attached thereto, are covered by a railway mortgage, even in the absence of a statute upon the subject.⁵ But other cases hold that the rolling-stock of a railroad must be regarded as chattels, which have not lost their distinctive character as personalty, by being affixed to, and incorporated with, the realty.⁶ In many of the states, the question has been settled by statutory provisions on the subject.⁶ A mortgage given by a railway company on its real estate, engines, cars, shops, tools, etc., "and all other personal property in any way belonging to the railroad of said company," does not include canal-boats owned by the company, and used and run by it in connection with the railroad, but beyond its terminus.⁷ So, lands acquired by a railroad company, and lying outside of the legal limits of the railroad track and branches, not used for shops, depots, stations, or other legitimate purposes of the company, are not within the description of a mortgage conveying, in general terms, the railway and its appurtenances.⁸

1 *Winslow v. Merchants' Ins. Co.* 4 Met. 306; *Snedeker v. Warring*, 12 N. Y. 170; *Corliss v. Van Sagin*, 29 Me. 115; *Meux v. Jacobs' Law R.* 7 H. L. Cas. 431; 13 Eng. R. 14.

2 *Bond v. Coke*, 71 No. Car. 97; and see *Phillips v. Winslow*, 18 B. Mon. 411; *Guo v. Tide-water Canal Co.* 24 How. 257. Compare *McRae v. Cent. Nat. Bank*, 60 N. Y. 439.

3 *State v. North Cent. Railw. Co.* 18 Md. 193; *Covey v. Pittsburgh etc. R. R. Co.* 3 Phila. 173; *Titus v. Simbelmer*, 27 Ill. 482; and compare *Plymouth R. R. Co. v. Colewell*, 39 Pa. St. 330; *Railroad Co. v. Elizabethtown*, 12 Bush, 233; *Morrill v. Noyes*, 53 Mo. 453.

4 *Palmer v. Forbes*, 23 Ill. 301; and see *Minnesota Co. v. St. Paul Co.* 2 Wall. 605; *Railroad Co. v. James*, 6 Id. 750; *United States v. New Orleans R. R.* 12 Id. 382; *Pullan v. Cin. etc. R. R. Co.* 4 Liss. 35; *Scott v. Clinton etc. R. R. Co.* 6 Id. 523; *Farmers' Loan etc. Co. v. St. Joseph etc. R. R. Co.* 3 Dill. 412.

5 *Williamson v. New Jersey etc. R. R. Co.* 29 N. J. Eq. 311; *Hoyle v. Pittsburgh etc. R. R. Co.* 54 N. Y. 314, reversing S. C. 51 Barb. 45; *Howe v. Freeman*, 14 Gray, 638; *Pacif. R. R. Co. v. Casa County*, 53 Mo. 17; *Boston etc. R. R. Co. v. Gilmore*, 37 N. H. 410; *Pierce v. Emery*, 32 Id. 4-5; *Coe v. Columbus etc. R. R. Co.* 10 Ohio St. 372; *Island v. Elwell*, 52 N. Y. 521.

6 See § 170. *ante*. In New York, it is not necessary to file as a chattel mortgage any mortgage executed by a railway company upon

real and personal property, and recorded as a mortgage of real estate in each county through which the railroad extends. Laws of 1869, ch. 779; and see *Benjamin v. Elmira etc. R. R. Co.* 54 N. Y. 675. Rolling stock is personal property in Texas—Tex. Const. art. x, § 4; in West Virginia—W. Va. Const. art. xl, § 8; in Missouri—Mo. Const. § 16, art. xl; in Illinois—Ill. Const. art. xl, § 10; in Nebraska—Neb. Const. art. xl, § 2; see Cal. Civ. Code, §§ 2955, 2957, 2961; Iowa Code, §§ 1234, 1235; Conn. Pub. Acts, 1877, chap. 38; Dakota, Rev. Code, 1877, p. 304; Stat. 35 & 36 Vict. chap. 50; *Blackmore v. Yates* Law R. 2 Ex. 225.

7 *Parish v. Wheeler*, 22 N. Y. 494.

8 *Seymour v. Railroad Co.* 25 Barb. 285; *Eldridge v. Smith*, 34 Vt. 484.

§ 179 **Mortgage of corporate franchises.**—Without some positive provision of the law allowing it, a corporation cannot mortgage its franchises,¹ and it has been even held that, without such provision, it cannot mortgage either its tolls, or such real estate as is necessary for the enjoyment of its corporate franchises.² It is clear that a corporation has no right to sell or assign its franchise to be a corporation, either in whole or in part, unless authorized by law.³ But a state legislature may authorize a corporation to mortgage its franchise;⁴ and a mortgage of a franchise without the authority of the legislature, may be ratified.⁵ So, if the legislature assume to give the authority, and money has been loaned on the faith of a mortgage made under the apparent grant of power, the courts will hesitate to withhold their aid to enforce payment, on the ground that the law was unconstitutional.⁶ But authority to a railway company to mortgage its "road, income, and other property," confers no authority to mortgage its franchises;⁷ though it does include a power to make a deed of trust in the nature of a mortgage.⁸ A mortgage given to the state, by authority of the legislature, on "roads, lands, and franchises," by foreclosure, passes all the franchises, including the right to be a corporation.⁹ And a mortgage given, by legislative authority, upon a railroad not completed at the time the mortgage was executed, in terms conveying the franchise of the company, and all property to be acquired, and describing the road as then projected, covers the road.

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as built, notwithstanding a change of route.¹⁰ When a railroad company mortgages its road and appurtenances, and also its franchise, it is not to be understood as conveying its corporate existence, but only the franchise necessary to make the conveyance productive and beneficial to the grantees.¹¹

1 *Susquehanna Canal Co. v. Bonham*, 9 Watts & S. 27; *Commonw. v. Smith*, 10 Allen, 448; *Stewart v. Jones*, 40 Mo. 140; *Daniels v. Hart*, 118 Mass. 543; *Carpenter v. Black Hawk Gold Min. Co.* 65 N. Y. 43. Compare *Meyer v. Johnson*, 53 Ala. 324; *Kennebec etc. R. R. Co. v. Portland etc. R. R. Co.* 59 Me. 23.

2 *Steiner's Appeal*, 27 Pa. St. 313; and see *Beaston v. Farmers' Bank*, 12 Peters, 102; *Black v. Del. etc. Co.* 22 N. J. Eq. 399; *Coe v. Columbus etc. R. R. Co.* 10 Ohio St. 372.

3 *Wood v. Bedford R. R. Co.* 8 Phila. 94; *York etc. R. R. Co. v. Winans*, 17 How. 39; *Hall v. Sullivan R. R. Co.* 11 Law R. N. S. 138; 2 Redf. Railw. Cas. 621; *Middlesex R. R. Co. v. Boston etc. R. R. Co.* 113 Mass. 347.

4 *East Boston Freight R. R. Co. v. East R. R. Co.* 13 Allen, 423; *State v. Morgan*, 28 La. An. 432; *Atkinson v. Marietta etc. R. R. Co.* 15 Ohio St. 21; *McAllister v. Plant*, 54 Miss. 106; *Pierce v. Milwaukee etc. R. R. Co.* 24 Wis. 551.

5 *Shaw v. Norfolk R. R. Co.* 5 Gray, 162; *Richards v. Merrimack etc. R. R.* 44 N. H. 127.

6 *City of Covington v. Cov. etc. Bridge Co.* 10 Bush, 69.

7 *Pullan v. Cin. etc. R. R. Co.* 4 Biss. 35.

8 *Pullan v. Cin. etc. R. R. Co.* 4 Biss. 35; and compare *Coe v. Johnson*, 13 Ind. 218; *White Water Valley Canal Co. v. Vallette*, 21 How. 414.

9 *St. Paul etc. R. R. Co. v. Parcher*, 14 Minn. 297.

10 *Elwell v. Grand St. etc. R. R. Co.* 67 Barb. 83. Compare *Randolph v. N. J. etc. R. R. Co.* 23 N. J. Eq. 49.

11 *Eldridge v. Smith*, 34 Vt. 484. See *Bardstown etc. R. R. Co. v. Metcalf*, 4 Met. (Ky.) 199; *Butler v. Rahm*, 46 Md. 547; *Copeland v. Citizens' Gas Light Co.* 61 Barb. 60; *Hays v. Ottawa etc. R. R. Co.* 61 Ill. 422; *Smith v. St. Louis etc. Ins. Co.* 2 Tenu. Ch. 727; *Phillips v. Winslow*, 18 B. Mon. 431; *Gardner v. London etc. Railw. Co.* Law R. 2 Ch. 201.

§ 180. Mortgage of future acquisitions.—A corporation may mortgage as security not only the then-acquired property, but also after-acquired property, requisite for the exercise of the corporate franchises.¹ A railway company may mortgage future net earnings to secure the interest on its bonds;² and in order to secure the debts of contractors for building its road, it may give a lien upon the moneys to arise from the sale of its surplus lands.³ A mortgage on a ditch or flume in process of construction was held to cover all improvements or fixtures then on the

line located for the flume, as well as those which might thereafter be put thereon.⁴ A mortgage given by a railway company upon its railroad, with the lands, tracks, buildings, privileges, and franchises, "together with all the locomotives, tenders, cars, carriages, tools, and machinery owned, or thereafter to be owned, by the company, or in any way belonging to or appertaining to said road, and to be used thereon," is valid in equity, in respect to subsequently-acquired property.⁵ Future calls cannot be mortgaged;⁶ but under a power to "pledge, mortgage, or charge the works, hereditaments, plant, property, and effects of the company," in order to secure money borrowed, the proceeds of a call already made, but not paid, may be charged.⁷ The rights of a mortgagee under a mortgage of after-acquired property are subject to such liens as attach to the property when it comes into the hands of the mortgagor;⁸ and, therefore, if a sale of property to the mortgagor has been fraudulently induced, the right of the seller to avoid the sale and recover the property is superior to any rights of mortgagees;⁹ but it is otherwise of a vendor's lien.¹⁰ In the absence of an agreement to the contrary, the mortgagor is generally entitled to the earnings and profits of the mortgaged property until some action by the mortgagee;¹¹ but the parties may agree in the mortgage that such income shall be held in equity by the mortgagee,¹² in which case the income, whenever received, is operated upon by the mortgage, and the party receiving it holds it in trust for whoever is in equity entitled to it.¹³ A mortgage of its property made by a corporation to secure future advances is not invalid upon that account.¹⁴ And one of several consolidating railroad companies may mortgage its property to secure its own debts, even after consolidation.¹⁵

1 *Phila. etc. R. R. Co. v. Woelper*, 64 Pa. St. 366; *Coe v. McBrown*, 23 Ind. 252; *Pierre v. Emery*, 32 N. H. 484; *Stevens v. Watson*, 4 Abb. Ct. App. 302; *Shaw v. L...*, 15 U. S. 10, 15; *Bloomer v. Union Coal etc. Co.* Law R. 16 Eq. 383; *Willink v. Andrews*, 16 C. L. (Ir.) 201.

2 *State v. North Cent. R. R. Co.* 18 Md. 193; *Dunham v. Issett*, 15 Iowa, 284.

- 3 *Gardner v. London etc. Railw. Co.* Law R. $\frac{1}{2}$ Ch. 201.
- 4 *Union etc. Co. v. Murphy etc. Co.* 22 Cal. 620; and see *New Orleans Nat. Bank v. Raymond*, 23 La. An. 355.
- 5 *Benjamin v. Elmira etc. R. R. Co.* 49 Barb. 441; and see *Henshaw v. Bank etc.* 10 Gray, 568; *Phillips v. Winslow*, 18 B. Mon. 431; *Howe v. Freeman*, 14 Gray, 506; *Willink v. Banking Co.* 3 Green Ch. 377; *Phila. etc. R. R. Co. v. Woolper*, 14 Pa. St. 366; 3 Am. R. 546. Compare *Farmers' etc. Trust Co. v. Commercial Bank*, 15 Wis. 424; *City of Bath v. Miller*, 83 Me. 383; *Drainerd v. Peck*, 34 Vt. 496; *Stevens v. Buffalo etc. R. R. Co.* 45 How. Pr. 104.
- 6 *Bank of South Australia v. Abrahams*, Law R. 6 P. C. 265; *Re British etc. Fire Assoc. Co.* 4 DeGex J. & S. 407; *Re Sankey Brook Coal Co.* Law R. 10 Eq. 381.
- 7 *Re Sankey Brook Coal Co.* Law R. 10 Eq. 381.
- 8 *Scott v. Railroad Co.* 6 Biss. 534; *United States v. New Orleans R. R. Co.* 12 Wall. 362.
- 9 *Williamson v. Railroad Co.* 29 N. J. Eq. 311.
- 10 *Pierce v. Milwaukee etc. R. R. Co.* 24 Wis. 551; and see *Short v. Battle*, 52 Ala. 436.
- 11 *Pullan v. Cin. etc. R. R. Co.* 5 Biss. 237; *Gilman v. Ill. etc. Tel. Co.* 91 U. S. 603; *Miss. etc. Railw. Co. v. U. S. Express Co.* 81 Ill. 534; *City Bank v. Tallman*, 31 Barb. 201.
- 12 *Pullan v. Cin. etc. R. R. Co.* 5 Biss. 237.
- 13 *Pullan v. Cin. etc. R. R. Co.* 5 Biss. 237.
- 14 *Conard v. Atlantic Ins. Co.* 1 Peters, 336; *Crewer etc. Min. Co. v. Williams*, 14 Week R. 441; 14 L. T. N. S. 93; and see *Alex. Sav. Inst. v. Thomas*, 23 Gratt. 433.
- 15 *Wright v. Bundy*, 11 Ind. 398.

§ 181. Form, execution, etc., of mortgage.—A trust deed to secure the payment of a debt, and containing a power of sale, is but a mortgage;¹ and it is usual in the United States to call the instrument "a deed of trust or mortgage," and its form may be that of either.² Where the instrument describes the property at first in general terms, and afterward describes particularly each thing mortgaged, the latter will control the former if there be repugnancy.³ In the execution of a mortgage by a corporation, statutory requirements must be complied with,⁴ and the mortgage must be executed in conformity with the by-laws of the company, if any exist upon the subject.⁵ A chattel mortgage executed on behalf of a company by its president, and sealed with his individual seal, may be treated as the simple contract of the company, if a seal is not requisite to the validity of the mortgage;⁶ otherwise, if the corporate seal be necessary to its valid-

ity.⁷ A mortgage executed and acknowledged by the directors of a company who were present, the corporation seal being duly affixed, was held to be good.⁸ There must be a delivery of the mortgage, and an acceptance by the mortgagee.⁹ And the fact that a mortgage was acknowledged or proved does not raise a conclusive presumption that it had been delivered.¹⁰

1 *Lawrence v. Farmers' Loan etc. Co.* 13 N. Y. 200, 642; *Bennet v. Union Bank*, 5 Humph. 612. See *Wilmer v. Atlanta etc. Railw. Co.* 2 Woods, 447.

2 *Coe v. McBrown*, 22 Ind. 252; *Canal Co. v. Vallette*, 21 How. 414; *Pullan v. Cin. etc. R. R. Co.* 4 Biss. 35.

3 *Pullan v. Cin. etc. R. R. Co.* 4 Biss. 35.

4 *Amerman v. Wiles*, 24 N. J. Eq. 13; *Hunt v. Bullock*, 23 Ill. 320; and see *the Patent File Co. Law R.* 6 Ch. 83.

5 *Gordon v. Preston*, 1 Watts, 335.

6 *Sherman v. Fitch*, 98 Mass. 59.

7 *Sherman v. Fitch*, 98 Mass. 59; *Richardson v. Scott River etc. Co.* 22 Cal. 150.

8 *Gordon v. Preston*, 1 Watts, 335.

9 See *Kingsbury v. Burn Ide*, 58 Ill. 310; 11 Am. R. 67; *Hawkes v. Pike*, 165 Mass. 530; 7 Am. R. 554; *Freeman v. Peay*, 23 Ark. 439.

10 *Bell v. Farmers' Bank*, 11 Bush, 34; 21 Am. R. 205.

§ 182. Power of a corporation to take a mortgage.—A banking company empowered by its charter to hold land mortgaged to it by way of security, may take a deed of land in trust to secure just debts due the company;¹ and if the deed also secures other debts which are void, the trust will fail as to them, but will be a valid security for the valid debts.² Under a general authority to take tolls, a bridge company may appoint a toll collector, and take his mortgage as security for the payment of all toll-money collected by him.³ If a corporation purchases property without authority, and sells the same, and takes a mortgage on it as security, it cannot refuse to apply payments made on the mortgage by reason of its want of authority.⁴ A bank, unless restrained by its charter, may take a mortgage to secure anticipated liabilities, as well as those existing at the time.⁵ But under the provisions of the National Banking Act,⁶ a national bank

cannot take a mortgage or deed of trust on real estate as security for a contemporaneous loan,⁷ or for future advances;⁸ but it may take real-estate security for a previous loan, if done in good faith.⁹ And a mortgage taken by a national bank, partly to secure pre-existing debts, and partly to secure a future loan, will be void as to the latter, but valid as to the former.¹⁰ A subscription for shares of stock in a manufacturing company is a good consideration for a bond and mortgage to secure the amount subscribed;¹¹ and the neglect or refusal of a company to issue to the mortgagor script for the shares at his request, will not amount to a failure of the consideration.¹²

1 *Bennett v. Union Bank*, 5 Humph. 612.

2 *Morris v. Way*, 16 Ohio, 469.

3 *Peru Bridge Co. v. Hendricks*, 18 Ind. 11; and see *Bank of Brighton v. Smith*, 5 Allen, 413; *Mayor etc. v. Harrison*, 30 N. J. L. 73.

4 *Parish v. Wheeler*, 22 N. Y. 494.

5 *Bank of United States v. Dandridge*, 12 Wheat. 64; *Crocker v. Whitney*, 71 N. Y. 161; and *Silver Lake Bank v. North*, 4 Johns. Ch. 370; *Farmers' etc. Trust Co. v. McKinney*, 6 McLean, L.

6 U. S. Rev. Stat. §§ 5136-7.

7 *Matthews v. Skinker*, 62 Mo. 329; *Kansas Valley Nat. Bank v. Rowell*, 2 Dill. 371.

8 *Crocker v. Whitney*, 71 N. Y. 161; *Thomp. Nat. Bank Case*, 745; *Kansas Valley Nat. Bank v. Rowell*, 2 Dill. 371.

9 *Fowler v. Scully*, 72 Pa. St. 456; *Merchants' Nat. Bank v. Mears*, *Thomp. Nat. Bank Case*, 353.

10 *Woods v. People's Nat. Bank*, 83 Pa. St. 57.

11 *Battershall v. Davis*, 31 Barb. 323.

12 *Battershall v. Davis*, 31 Barb. 323.

§ 183. **Priority of liens.**—As between two independent mortgages, the one first recorded is generally the prior lien.¹ If several notes are secured by the same mortgage, they are to be paid from the mortgage fund in the order in which they mature.² The priority of the respective liens of mortgagees, mechanics, material-men, etc., principally depends upon the language and construction of the provisions of the statutes on the subject in the different states, and the statute of the particular state should be consulted.³ Under the English Companies' Act, a register of all mortgages and charges is required to

be kept;⁴ and unregistered debentures in the hands of the solicitors or directors of the company are held to be invalid;⁵ but otherwise, as to similar debentures or charges in the hands of the company's bankers,⁶ or of ordinary persons.⁷

1 *Peychaud v. Citizens' Bank*, 21 La. An. 362; *Odd Fellows' Sav. Bank v. Bouton*, 46 Cal. 603. Compare *Brunswick etc. R. R. Co. v. Hughes*, 52 Ga. 557; *Campbell v. Texas*, 2 Wood, 263.

2 *Marine Bank v. International Bank*, 9 Wis. 57; *Bank of U. S. v. Covert*, 13 Ohio, 240.

3 See *Getchell v. Allen*, 34 Iowa, 559; *Denniston v. Chicago etc. R. R. Co.* 4 Ills. 414; *Hazard Powder Co. v. Loomis*, 2 Dist. 344; *Davis v. Bilsland*, 18 Wall. 630; *Heifrich v. Weaver*, 61 Pa. St. 385.

4 See *Reg. v. Wilts etc. Canal Co.* 3 Ad. & E. 477; *Birmingham etc. Railw. Co. v. White*, 1 Q. B. 262.

5 *Re Wynn Hall Coal Co.* Law R. 10 Eq. 515; *Ex parte Valpy*, Law R. 7 Ch. 280; *Re Native Iron Ore Co.* 2 Ch. Div. 345. Compare *Re International Pulp etc. Co.* Law R. 6 Ch. Div. 556.

6 *Re General Prov. Assu. Co.* Law R. 14 Eq. 507.

7 *Re General South American Co.* 2 Ch. Div. 337; *Green's Brice's Ultra Vires*, (2nd Am. ed.) 248.

§ 184. **Enforcement of mortgage.**—One remedy of a mortgagee is by foreclosure, two methods of which are provided by law, independent of statute—namely, strict foreclosure, and foreclosure by a sale of the property to the highest bidder, under the direction of an officer of the court.¹ The effect of the former is to extinguish the right of redemption, and to transfer the absolute title without sale, irrespective of the value of the premises;² and the effect of the latter method is the same as that of the former to extinguish the equity of redemption, and to leave the title conveyed by the mortgage absolute.³ In many of the states there are statutes which regulate the remedy, and their provisions must be strictly pursued.⁴ Concurrent proceedings at law and in equity are allowed in some of the states;⁵ and the right to foreclose by bill in equity was held not to be affected by a provision in a railway mortgage authorizing the trustee to take possession of the road, operate it, receive its income, and, upon due notice, to sell it, on default of the company to pay interest.⁶

1 See *Slee v. Manhattan Co.* 1 Paige, 48, 79; *Wilson v. Troup*, 2 Cowen, 198; *Lausling v. Albany Ins. Co.* Hopk. Ch. 162; *Johnson v. Donnell*, 15 Ill. 97; *Elliott v. Wood*, 45 N. Y. 71; 33 Barb. 285.

2 *Bradley v. Chester Valley R. R. Co.* 36 Pa. St. 141; *Packer v. Rochester etc. R. R. Co.* 17 N. Y. 253, 257.

3 *Packer v. Rochester etc. R. R. Co.* 17 N. Y. 283, 287; *Mendenhall v. West Chester etc. R. R. Co.* 36 Pa. St. 146.

4 See *Cohoes Co. v. Goss*, 13 Barb. 137; *Lawrence v. Farmers' etc. Trust Co.* 13 N. Y. 290; *Chase v. McClellan*, 4 Me. 375.

5 See *Equitable Life Ins. Soc. v. Stevens*, 63 N. Y. 341; *Armstrong v. Ross*, 20 N. J. Eq. 109; *State v. Florida etc. R. R. Co.* 15 Fla. 600.

6 *Alexander v. Central R. R.* 3 Dill. 487.

CHAPTER XV.

CONSOLIDATION.

- § 185. Definition.
- § 186. Power to consolidate.
- § 187. Construction of statutory power.
- § 188. Assent of stockholders.
- § 189. Effect on former companies.
- § 190. Effect upon property of former companies.
- § 191. Effect as to liabilities of new company.
- § 192. Of corporations created in different states.

§ 185. Definition.—The term “consolidation,” as applied to corporations in American law, is “a surrender of the old charters by companies, the acceptance thereof by the legislature, and the formation of a new corporation out of such portions of the old as enter into the new.”¹ Where three companies were consolidated, the effect of the consolidation was said to be a “dissolution of the three corporations named, and, at the same instant, the creation of a new corporation, with property, liabilities, and stockholders derived from those then passing out of existence.”² In England, the term “amalgamation” is employed instead of “consolidation,” and an amalgamation is assumed to be where both companies agree to abandon their regulations and articles of association, and to register themselves under new articles as one body.³

¹ *State v. Bailey*, 16 Ind. 46; *Lauman v. Lebanon etc. R. R. Co.* 30 Pa. St. 42; and compare *Shields v. Ohio*, 25 U. S. 319; *Railroad Co. v. Georgia*, 98 Id. 359; *Railroad Co. v. Maine*, 96 Id. 499; 66 Me. 408; *Clearwater v. Meredith*, 1 Wall. 25, 40; *Miller v. Lancaster*, 5 Cold. 514.

² *McMahan v. Morrison*, 16 Ind. 172. Compare *Powell v. North Mo. Railw. Co.* 42 Mo. 63.

³ In *Re Bank of Hindostan etc.* 2 Hen. & M. 666; and see *Re Empire Assu. Corp.* Law R. 4 Eq. 341; *Clinch v. Financial Corp.* Law R. 4 Ch. 117.

§ 186. Power to consolidate.—The assent of the legislature, by express grant or necessary implication,¹ is

essential, in order to render consolidation effective and valid.³ The amalgamation of companies, in the absence of authority clearly conferred, is *ultra vires*, not merely of the directors, but of the company.³ And the directors of a railway company may be restrained, at the suit of a shareholder, from carrying into effect an agreement with another company to amalgamate their lines, without the sanction of the legislature.⁴ But the power of the legislature to confer authority upon companies to consolidate or amalgamate is unquestioned;⁵ and this authority may be conferred in the original charters,⁶ or by the provisions of a general or special act passed prior to consolidation, and after the organization of the original corporations,⁷ or even by an express sanction of an unauthorized agreement to consolidate.⁸

1 Clearwater v. Meredith, 1 Wall. 25; Canal Co. v. Fulton Bank, 7 Wend. 412; Johnson v. Shrewsbury etc. Railw. Co. 3 DeGex M. & G. 914.

2 Fisher v. Evansville etc. R. R. Co. 7 Ind. 407; London etc. Railw. Co. v. Goodwin, 3 Ex. 320.

3 Era etc. Assu. Co. 1 DeGex J. & S. 29; and see Black v. Del. etc. Canal Co. 24 N. J. Eq. 455; Blatchford v. Ross, 5 Abb. Fr. N. S. 434; 34 Barb. 42.

4 Charlton v. New Castle etc. Railw. Co. 5 Jur. N. S. 1097; and see Mauderson v. Commercial Bank, 28 Pa. St. 379; Ware v. Grand Junction Water Works Co. 2 Russ & M. 470; Watson v. Harlem etc. Nav. Co. 42 How. Pr. 348.

5 Clinch v. Financial Corp. Law R. 5 Eq. 450; Black v. Del. etc. Canal Co. 24 N. J. Eq. 130; 34 Id. 455; Clearwater v. Meredith, 1 Wall. 25.

6 Nugent v. Supervisors etc. 19 Wall. 241.

7 Black v. Del. etc. Canal Co. 24 N. J. Eq. 130; 34 Id. 455; and see Bishop v. Brainard, 23 Conn. 239; Southall v. British etc. Assu. Soc. Law R. 11 Eq. 65; Pearce v. Madison etc. R. R. Co. 21 How. 441.

8 See Mead v. New York etc. R. R. Co. 45 Conn. 199; Mozley v. Alston, 1 Phill. Ch. 790; McAuley v. Columbus etc. R. R. Co. 83 Ill. 348; Shrewsbury etc. Railw. Co. v. Stone Valley Railw. Co. 2 DeGex M. & G. 886.

§ 187. Construction of statutory power.—Under an authority to consolidate, but without express provision as to the mode, the consolidation may be effected in the usual mode of corporate action.¹ Power given to one railroad company to consolidate with any other, authorizes whatever other company it selects for a union to unite with it.² A railway company merely “associating, ally-

ing, and connecting itself" with another, is not thereby equitably "amalgamated" with the latter.³ And merely organizing a corporation under a general law, of the same name as a previously existing masonic lodge, is not a merger of such lodge in the corporation.⁴ One railroad company may be formed by the consolidation of several, and constituted a legal incorporation by filing its certificate of consolidation with the secretary of state, under the Pennsylvania statute.⁵ In general, precedent formalities must be observed and completed, or the consolidation will fail to be perfect.⁶ But, in some of the states, great liberality is allowed to sustain the validity of proceedings to consolidate, had under general statutes.⁷

1 See *Black v. Del. etc. Canal Co.* 22 N. J. Eq. 130; 24 id. 155.

2 *Re Prospect Park etc. R. R. Co.* 67 N. Y. 371. But compare *State v. Consolidation Coal Co.* 40 Md. 1.

3 *Shrewsbury etc. Railw. Co. v. Stour Valley Railw. Co.* 2 De Gex M. & G. 866. Compare *Great North. Railw. Co. v. Manchester etc. Railw. Co.* 5 De Gex & S. 133; *Lancashire etc. Railw. Co. v. East Lancashire Railw. Co.* 5 H. L. Cas. 792.

4 *Mason v. Finch*, 23 Mich. 282.

5 *Commonw. v. Atlantic etc. Railw. Co.* 53 Pa. St. 9.

6 *Tuttle v. Mich. etc. R. R. Co.* 35 Mich. 247; *Mansfield etc. R. R. Co. v. Dunker*, 30 id. 124.

7 *Dimpfel v. Ohio etc. R. R. Co.* 8 Reporter, 641.

§ 188. Assent of stockholders.—As a general rule, the consent of every stockholder is necessary for consolidation, and those who dissent cannot be compelled.¹ There is no power to force a dissenting stockholder to join the new corporation, and to receive stock in it on the surrender of his stock in the old company.² And a consolidation without his consent, relieves him from liability on his subscription, or entitles him to recover his interest.³ But a subscription to stock in the new corporation may be deemed a sufficient consent to the consolidation;⁴ and if the subscriber knows, at the time of subscribing, that a consolidation may take place, as where authority is given in the charter, or in an act passed before the subscription, he will be bound.⁵ And it is well settled that the legis-

lature may, by the exercise of the right of eminent domain, grant authority to consolidate corporations having duties to perform to the public, without the consent of stockholders;⁶ but provision must be made for a just compensation for the shares of such stockholders as dissent,⁷ and they can enjoin the consolidation until such compensation is made.⁸

1 *Black v. Del. etc. Canal Co.* 24 N. J. Eq. 455; *Kean v. Johnson*, id. 401; *Fisher v. Evansville etc. R. R. Co.* 7 Ind. 407; *Blanchford v. Ross*, 5 Abb. Pr. N. S. 434; 54 Barb. 43; *Chapman v. Mad River etc. R. R. Co.* 6 Ohio St. 119; and see *Re Empire Assn. Corp.* Law R. 4 Eq. 341.

2 *Clearwater v. Meredith*, 1 Wall. 25; and see *McMahan v. Morrison*, 16 Ind. 172; *Mowry v. Indiana etc. R. R. Co.* 4 Biss. 78.

3 *Shelbyville etc. Turnp. Co. v. Barnes*, 43 Ind. 498; *Lauman v. Lebanon Valley R. R. Co.* 30 Pa. St. 42; *Illinois Grand Trunk R. R. Co. v. Cook*, 23 Ill. 237. Compare *Cork etc. Railw. Co. v. Paterson*, 18 Com. B. 414; *Midland etc. Railw. v. Leech*, 3 H. L. Cas. 572.

4 *Fisher v. Evansville etc. R. R. Co.* 7 Ind. 407.

5 *Nugent v. Supervisors etc.* 19 Wall. 241; and see *Gardiner v. Hamilton Ins. Co.* 33 N. Y. 421; *Ottawa etc. R. R. Co. v. Black*, 79 Ill. 262; *Mowry v. Ind. etc. R. R. Co.* 4 Biss. 78; *Hamilton Ins. Co. v. Hobart*, 3 Gray, 543; *Hauna v. Cin. etc. R. R. Co.* 20 Ind. 30.

6 *Black v. Del. etc. Canal Co.* 24 N. J. Eq. 455; and see *Crosby v. Hanover*, 30 N. H. 404; *Eastern Union Railw. Co. v. Cockrane*, 9 Ex. 197; *Purnell v. Wolverhampton etc. Co.* 10 Com. B. N. S. 578.

7 *McCray v. Junction Railw. Co.* 9 Ind. 353; *Shelbyville etc. Turnp. Co. v. Barnes*, 43 Ind. 498; *Lauman v. Lebanon Valley R. R. Co.* 30 Pa. St. 42.

8 *Lauman v. Lebanon Valley R. R. Co.* 30 Pa. St. 42.

§ 189. Effect on former companies.—Whether a consolidation works a dissolution of the former companies, and the creation of a new one, is held to depend upon the intent of the statute under which consolidation takes place.¹ But generally speaking, except so far as the contrary may be provided by the act,² the effect of consolidation is to dissolve all the old corporations and create a new one;³ and the new body assumes the liabilities and succeeds to the rights of the old.⁴ Where the act provided that the new body was to "have the powers, privileges, and immunities possessed by each of the corporations" united in it, and these had somewhat different powers, etc., the provision was construed so as to give the new body those only which each of the previous corporations possessed.⁵ A new corporate body, formed by the consoli-

dation of two corporations chartered before, but consolidated after, the enactment of a general law reserving to the legislature the right to alter or repeal all corporate charters, was adjudged to come into existence subject to such general law.⁶

1 Central R. R. etc. Co. v. Georgia, 92 U. S. 685; 54 Ga. 401; and see Muller v. Dows, 94 U. S. 444; State v. Greene County, 54 Mo. 540; Southwestern R. R. Co. v. Georgia, 92 U. S. 676 n.; County of Scotland v. Thomas, 94 U. S. 682.

2 Chicago etc. R. R. Co. v. Moffit, 75 Ill. 524; Zimmer v. State, 20 Ark. 677; Thompson v. Abbott, 61 Mo. 176.

3 Paine v. Lake Erie etc. R. R. Co. 31 Ind. 283; § 285, *ante*.

4 Zimmer v. State, 20 Ark. 677; Robertson v. City of Rockford, 21 Ill. 451; Miller v. Lancaster, 5 Cold. 514.

5 State v. Maine Cent. R. R. Co. 66 Me. 488; 96 U. S. 499. Compare Tomlinson v. Branch, 15 Wall. 460; Phila. etc. R. R. Co. v. Maryland, 10 How. 376; Fisher v. N. Y. etc. R. R. Co. 46 N. Y. 644; New Jersey etc. Railw. Co. v. Strait, 35 N. J. L. 322; Gould v. Langdon, 43 Pa. St. 366; Rowe etc. R. R. Co. v. Ontario etc. R. R. Co. 16 Hun, 445.

6 Shields v. Ohio, 96 U. S. 319.

§ 190. Effect upon property of former companies.—In the absence of express provision to the contrary, the new corporation will be entitled to all the property of the extinguished ones.¹ A patented invention which both the former companies had been licensed to use, may be used by the new company, in case of consolidation.² So, the right to subscriptions by towns and counties in aid of a railroad company passes, with other rights and privileges, to the new corporation.³ But the new corporation cannot claim the position of a *bona fide* purchaser for value, where no money is paid by either party, and it takes the property of the extinguished corporation subject to any existing liens.⁴

1 Columbus etc. R. R. Co. v. Powell, 40 Ind. 37; Thompson v. Abbott, 61 Mo. 176.

2 Lightner v. Boston etc. R. R. Co. 1 Low. Dec. 338; and see Hubbard v. Chappel, 14 Ind. 601; Bishop v. Brainerd, 28 Conn. 289.

3 See County of Scotland v. Thomas, 94 U. S. 682; State v. Greene County, 54 Mo. 540; Nugent v. Supervisors etc. 3 Biss. 105; 19 Wall. 241.

4 The Key City, 14 Wall. 653; and compare Bouffer v. Great Western R. R. Co. 25 Ill. 353.

§ 191. Effect as to liabilities of new company.
The new company may not only enforce the rights of the
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old companies,¹ but it is also subject to their liabilities.² The fact of consolidation implies an acceptance by the newly-formed company of the rights and liabilities of the old ones, to the extent directed by the act authorizing the consolidation.³ Notes given by one of the old companies may be sued against the new one, under the name assumed on consolidation.⁴ So, of a demand for wages against one of the old companies;⁵ and so, of a claim for damages for a personal injury sustained by reason of the negligence of one of the old companies.⁶ The act authorizing consolidation generally provides, however, for the continuance of the separate existence of the old companies as it respects all outstanding obligations to third parties,⁷ including those arising out of torts;⁸ and consolidation does not impair the existence of either of the old companies as it respects the prosecution of suits already commenced.⁹ Choses in action, transferred to the new corporation, may be enforced by it in its own name;¹⁰ and it may compromise and settle a claim against either of the old companies.¹¹ Where two or more companies are consolidated, and the new body thus formed assumes the debts and obligations of the old companies, its officers are neither necessary nor proper parties to an action to enforce a liability of one of the original companies;¹² if the plaintiff has a cause of action, it is against the new corporation alone.¹³

1 See § 189, *ante*; *University of Vermont etc. v. Baxter*, 42 Vt. 99.

2 *Eaton etc. R. R. Co. v. Hunt*, 20 Ind. 463; *Indianapolis etc. R. R. Co. v. Jones*, 29 Id. 465; *Powell v. North Mo. R. R. Co.* 42 Mo. 63; and see *Hopper v. Moore*, 42 Iowa, 563; *Montgomery etc. R. R. Co. v. Borling*, 51 Ga. 582; *Frouty v. Lake Shore etc. R. R. Co.* 52 N. Y. 363.

3 *Miller v. Lancaster*, 5 Cold. 514.

4 *Columbus etc. R. R. Co. v. Skidmore*, 69 Ill. 566; see also *University of Vt. etc. v. Baxter*, 42 Vt. 99.

5 *West Union R. R. Co. v. Smith*, 75 Ill. 496; and see *Phila. etc. R. R. v. Howard*, 13 How. 307.

6 *Warren v. Mobile etc. R. R. Co.* 49 Ala. 582. Compare *Miller v. Nat. Steamship Co.* 67 Barb. 285.

7 See *Shaw v. Norfolk County R. R. Co.* 16 Gray, 407; 2 N. Y. Rev. Stat. (6th ed.) 556; *Gen. Laws of Cal.* 1850-64, p. 136; *Iowa Code*, § 1275; *Const. of Mo. art. xii, §§ 17, 18*; *Code of Ala.* p. 642; *East Tenn. etc. R.*

R. Co. v. Evans, 6 Heisk. 607; *Rome etc. R. R. Co. v. Ontario etc. R. R. Co.* 16 Hun. 445; *Penn'a College Cases*, 13 Wall. 190.

8 *Scima etc. R. R. Co. v. Harbin*, 40 Ga. 706. See *Warren v. Mobile etc. R. R. Co.* 49 Ala. 582.

9 *Prouty v. Lake Shore etc. R. R. Co.* 52 N. Y. 363; *Shackelford v. Miss. etc. R. R. Co.* 52 Miss. 159; *Baltimore etc. R. R. Co. v. Musselman*, 2 Grant Cas. 348.

10 *University of Vt. etc. v. Baxter*, 42 Vt. 99; and see *Columbus R. R. Co. v. Powell*, 40 Ind. 37; *Miller v. Lancaster*, 5 Cold. 514; *Cumberland College v. Ish*, 22 Cal. 641.

11 *Paine v. Lake Erie etc. R. R. Co.* 31 Ind. 283.

12 *Chase v. Vanderbilt*, 62 N. Y. 307.

13 *Chase v. Vanderbilt*, 62 N. Y. 307.

§ 192. Of corporations created in different states.—Several states may, by competent legislation, unite in creating the same corporation, or in combining several pre-existing corporations into a single one.¹ But it is held that such a union does not convert the old corporation into one company in the same way, and to the same degree that follows a consolidation of two companies within the same state.² The *status* of a company acting under charters from two states, is that of an association incorporated in and by each of the states, and when acting as a corporation in either of the states, it acts under the authority of the charter of the state in which it is then acting, and that only—the legislation of the other state having no operation beyond its territorial limits.³ As it regards the federal courts, the jurisdictional effect of the existence of a corporation formed by the consolidation of corporations chartered by different states, is the same as that of a copartnership of individual citizens residing in different states.⁴

1 *Railroad Co. v. Harris*, 12 Wall. 65; *Bishop v. Brainerd*, 28 Conn. 289; *Eaton etc. R. R. Co. v. Hunt*, 20 Ind. 457. Compare *Ohio etc. R. R. Co. v. Wheeler*, 1 Black, 288; *Railroad Co. v. Whitton*, 13 Wall. 270.

2 *Racine etc. R. R. Co. v. Farmers' etc. Trust Co.* 49 Ill. 331. The new company stands in the same relation to each state as the original company in that state: *Delaware R. R. Tax Case*, 2 Abb. U. S. 323; 18 Wall. 206.

3 *Quincy Bridge Co. v. Adams Co.* 88 Ill. 615; and see *Baltimore etc. R. R. Co. v. Gallahue*, 12 Gratt. 658; *Balt. etc. R. R. Co. v. Glenn*, 28 Md. 287; *Att.-Gen. v. Boston etc. R. R. Co.* 109 Mass. 99. But compare *Bridge Co. v. Mayor*, 31 Ohio St. 317.

4 Railroad Co. v. Harris, 12 Wall. 65. See, generally, on this subject, Matter of U. S. Rolling-stock Co. 57 How. Pr. 16; Matter of Sage v. Lake Shore etc. R. R. Co. 70 N. Y. 220; Farmers' Bank v. Gettlinger, 4 W. Va. 305; City of Covington v. Covington etc. Bridge Co. 10 Bush, 69; State v. Metz, 32 N. J. L. 199; Peck v. Chicago etc. R. R. Co. 94 U. S. 164; Railroad Co. v. Vance, 98 U. S. 450. A corporation may have a two-fold organization, and be, so far as its relation to one state is concerned, both foreign and domestic. It may have a corporate entity in each state, yet in its general character be of a bi-fold organization; McGregor v. Erie Railw. Co. 35 N. J. L. 115.

CHAPTER XVI

VISITATION.

- § 193. Object and nature of.
- § 194. Who is visitor, and how appointed.
- § 195. Powers of visitor.
- § 196. Jurisdiction of the courts.

§ 193. Object and nature of.—The object of subjecting corporations to the inspection and control of visitors, is, to maintain their peace and good government.¹ Strictly speaking, the power of visitation applies only to ecclesiastical and eleemosynary corporations, and to these the power is a necessary incident.² As it respects civil corporations, public or private, the legislature is itself the visitor, through the medium of the courts.³

¹ See *Rex v. Bishop of Ely*, 2 Term Rep. 290; *Att.-Gen. v. St. Cross Hospital*, 17 Beav. 435; *Bluney's Case*, 2 Bland, 141; *Dartmouth College v. Woodward*, 4 Wheat. 518; *Amherst Acad. v. Cowles*, 6 Pick. 427.

² *Phillips v. Bury*, 2 Term Rep. 346; *Murdock v. Phillips Academy*, 12 Pick. 244; *Allen v. McKeen*, 1 Sum. (C. C.) 276.

³ *Amherst Acad. v. Cowles*, 6 Pick. 443; *Commonw. v. Del. Canal Co.* 43 Pa. St. 295. And see titles *MANDAMUS* and *QUO WARRANTO*.

§ 194. Who is visitor, and how appointed.—The visitorial power over ecclesiastical corporations in England, is vested in the founder, his heirs and assigns, or if these fail, in the king and his successors.¹ But, as will hereafter be seen, this has no application to religious institutions in this country.² As it respects eleemosynary corporations, or those founded for charitable purposes, they are by the common law subject to the private government of the founder and his heirs,³ unless the visitorial power is given to some other person or body.⁴ The origin of this power is the property of the donor, and the power which every one has to dispose, direct and regulate his own property.⁵ But the founder may, at the time of en-

dowment, assign the power to another person, in which case the latter will possess it to the exclusion of the founder's heirs.⁶ If trustees are appointed by charter to manage the charity, in accordance with the will of the founder, the power of visitation belongs to them in their corporate capacity.⁷ The legislature is the visitor of all civil corporations;⁸ and where a voluntary society accepts a charter granted by legislative authority, it thereby subjects itself to the supervision of the proper legal authorities having jurisdiction in such cases.⁹ Generally, as it respects colleges, academies, and schools in this country, the trustees named in the charter, and those chosen as their successors according to its terms, are not only trustees of the fund, but also take the place of the founder of the charity as its lawful visitors and overseers.¹⁰ The only duty of the courts is to see that the trust is faithfully executed.¹¹ If general visitorial power is conferred upon the selectmen of a town in the capacity of trustees of an academy, the selectmen are not the agents of the town, and accountable to it for their acts as visitors;¹² nor can they, in the exercise of their powers as visitors, be controlled by the town.¹³ They exercise a special authority, created by the will of the testator, or, if incorporated, conferred by the act of incorporation.¹⁴ No particular form of words is required in order to assign or vest the power of visitation.¹⁵ The words "let him be a visitor," in the charter or statutes, are deemed sufficient.¹⁶

1 *Rex v. Catherine's Hall*, 4 Term Rep. 233.

2 See *Tit. RELIGIOUS SOCIETIES*; *Robertson v. Bullions*, 11 N. Y. 243.

3 *Dartmouth College v. Woodward*, 4 Wheat. 673; *Sanderson v. White*, 18 Pick. 323, 334; *Re Berkhamstead School*, 2 Ves. & B. 134; *Att.-Gen. v. St. Cross Hospital*, 17 Beav. 435.

4 *Att.-Gen. v. Clare College*, 3 Atk. 662; *Edew v. Foster*, 2 P. Wms. 325; *Dartmouth College v. Woodward*, 4 Wheat. 673.

5 *Green v. Rutherford*, 1 Ves. Sr. 462; *Att.-Gen. v. Archbishop of York*, 2 Russ. & M. 717.

6 *Nelson v. Cushing*, 2 Cush. 519, 530; *Murdock v. Phillips Academy*, 7 Pick. 304; *King v. Bishop of Worcester*, 4 Maule & S. 415.

7 *Fuller v. Plainfield Academic School*, 6 Conn. 532, 544; *Dartmouth Coll. v. Woodward*, 4 Wheat. 674; *Allen v. McKean*, 1 Sum. 274.

8 See § 193, *ante*.

9 *State v. Georgia Med. Coll.*, 38 Ga. 608; 1 Withr. Corp. Cas. 328. See *Weary v. State University*, 42 Iowa, 335.

10 *Murdock v. Phillips Academy*, 7 Pick. 303; *Bracken v. Will. & M. Coll.* 1 Call, 161; 3 id. 573; *State v. Adams*, 44 Mo. 570.

11 *State v. Adams*, 44 Mo. 570.

12 *Nelson v. Cushing*, 2 Cush. 519.

13 *Nelson v. Cushing*, 2 Cush. 519.

14 *Nelson v. Cushing*, 2 Cush. 519.

15 See *Sanderson v. White*, 18 Pick. 338; *Rex v. Bishop of Worcester*, 4 Maule & S. 415.

16 *Rex v. Bishop of Ely*, 1 Black. W. 83.

§ 195. **Powers of visitor.**—It is a general rule that, in the absence of a trust, the jurisdiction of a visitor is supreme and exclusive, within the limits of the authority bestowed upon him.¹ But if he exceed his authority, or act in a matter beyond his authority, a writ of prohibition lies against him.² Regulations that in ordinary corporations are made by stockholders, and disputes that are submitted to the courts, are, in the case of eleemosynary corporations, made and decided by those intrusted with the visitorial power.³ They may examine into and regulate the conduct of members,⁴ amend and repeal by-laws of the corporation,⁵ correct abuses,⁶ and assume the general management of the trust;⁷ subject only to the expressed will of the founder, as embodied in the charter.⁸ Being the creatures of the charter, they have no power over it, and it is their absolute rule of conduct.⁹ If there are particular statutes, they constitute the rule of the visitor;¹⁰ if the statutes direct the manner in which the visitorial power is to be exercised, that mode must be pursued.¹¹ The words "shall and may," used in a general act, or in the constitution of a private charity, are to be construed imperatively, as the word "must."¹² Funds left by will to establish a school for the instruction of "youth," were adjudged to be applicable to the support of a school for both sexes.¹³ A visitor cannot compel a specific performance.¹⁴ And since the tribunal of the visitor is strictly domestic, he cannot take cognizance of acts of disobedience to the general laws of the land.¹⁵

1 *Rex v. Bishop of Worcester*, 4 Manle & S. 415; *Att.-Gen. v. Foundling Hospital*, 2 Ves. 42; *Thompson v. University of London*, 33 Law J. Ch. 625; and see *University of Md. v. Williams*, 9 Gill & J. 363; *People v. Sailors' Snug Harbor*, 64 Barb. 532.

2 *Bishop of Chichester v. Harward*, 1 Term Rep. 656; *Rex v. Bishop of Ely*, 1 Black. W. 81; *Whiston v. Dean etc. of Rochester*, 7 Hare, 532.

3 *State v. Adams*, 44 Mo. 570; *Murdock v. Phillips Academy*, 7 Pick. 303.

4 *Phillips v. Bury*, 2 Term Rep. 349; *Garnett v. Fernand*, 6 Barn. & C. 611; *Murdock v. Phillips Academy*, 12 Pick. 262.

5 See *Trustees of Phillips Academy v. King*, 12 Mass. 547; *Att.-Gen. v. Earl of Clarendon*, 17 Ves. 491; *Dartmouth Coll. v. Woodward*, 4 Wheat. 690.

6 *Phillips v. Bury*, 2 Term Rep. 348; *Att.-Gen. v. Price*, 3 Atk. 103; *Bracken v. Will. & M. Coll.* 3 Call. 573.

7 *Sanderson v. White*, 18 Pick. 328; *Allen v. McKean*, 1 Sum. 776; *Att.-Gen. v. Middleton*, 2 Ves. Sr. 237; *In Re Christ Church*, Law R. 1 Ch. App. 526.

8 *State v. Adams*, 44 Mo. 570; *Dartmouth College v. Woodward*, 4 Wheat. 676; *Gilman v. Hamilton*, 16 Ill. 236.

9 *State v. Adams*, 44 Mo. 570.

10 *Phillips v. Bury*, 2 Term Rep. 350; *Rex v. Bishop of Ely*, 1 Black. W. 89.

11 *Phillips v. Bury*, 2 Term Rep. 350.

12 *Att.-Gen. v. Locke*, 2 Atk. 166.

13 *Nelson v. Cushing*, 2 Cush. 530.

14 *Rex v. Windham*, Cowp. 377; and see *Reg. v. Kendall*, 1 Ad. & E. 385.

15 *Rex v. St. John's College*, 4 Mod. 233; and see *Rex v. Bishop of Ely*, 1 Black. W. 82.

§ 196. Jurisdiction of the courts.—At common law, no appeal lies from the sentence of a visitor.¹ Within the scope of the general visitorial power, his determinations are final and conclusive.² But an appeal is sometimes given by the charter, or act of incorporation.³ And where there is a clear and distinct trust, a court of equity will administer and enforce it as much where there is a visitor, as where there is none.⁴ And when visitors, in the exercise of their power, so act as to be guilty of a breach of trust, then a court of equity may interpose, as the representative of the public, to prevent and restrain such breach of trust, and, if necessary, may remove a trustee and substitute another.⁵

1 *Phillips v. Bury*, 2 Term Rep. 346; *Rex v. Bishop of Ely*, id. 296; *Murdock's Appeal*, 7 Pick. 322. Compare *Matter of Dean of York*, 2 Q.

R. 1; and see *Latimer v. Eddy*, 46 Barb. 61; *Harper v. Straws*, 14 B. Mon. 48.

2 *Att.-Gen. v. Talbot*, 3 Atk. 662; and see *Reg. v. Dean etc. of Rochester*, 17 Q. B. 1; *Reg. v. Dean of Chester*, 15 id. 513.

3 *Murlock's Appeal*, 7 Pick. 322.

4 *Att.-Gen. v. St. Cross Hospital*, 17 Beav. 435; *Att.-Gen. v. Sidney Sussex College*, Law R. 4 Ch. 722; *Shore v. Wilson*, 9 Clark & F. 355; *Thornton v. Howe*, 31 Beav. 14; *Att.-Gen. v. Dangars*, 33 id. 621.

5 *Dangars v. Rivaz*, 28 Beav. 233; *Att.-Gen. v. Garrison*, 101 Mass. 223; *Att.-Gen. v. Tudor Ice Co.* 104 id. 239; S. C. 6 Am. R. 227; *Att.-Gen. v. Utica Ins. Co.* 3 Johns. Ch. 384.

CHAPTER XVII.

DISSOLUTION.

- § 197. Grounds of, in general.
- § 198. By legislative act.
- § 199. By loss of members.
- § 200. Effect of omission to elect officers.
- § 201. By voluntary surrender of franchises.
- § 202. Effect of insolvency.
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- § 207. Effect of dissolution in general.
- § 208. Effect upon pending suits.
- § 209. Effect upon contracts.
- § 210. Rights of creditors, stockholders etc.
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§ 197. Grounds of, in general.—Corporations may be dissolved, or lose their legal existence, first, by the act of the legislature; second, by the loss of all their members, or of an integral part; third, by a surrender of their charters; fourth, by a forfeiture of their franchises.¹ And where the act of incorporation fixes a definite time at which the charter shall expire, when that time arrives, the corporation is dissolved.²

1 New York etc. Iron Works v. Smith, 4 Duer, 362; Revere v. Boston Copper Co. 15 Pick. 351; McIntire Poor School v. Zanesville etc. Manuf. Co. 4 Ohio, 203; Boston Glass Manufactory v. Langdon, 24 Pick. 49; Penobscot Boom Corp. v. Lamson, 16 Me. 224; Canal Co. v. Railroad Co. 4 Gill & J. 1.

2 La Grange etc. R. R. Co. v. Rainey, 7 Cold. 420; and see Bank of Miss. v. Wrenn, 3 Smedes & M. 791; Sala v. City of New Orleans, 2 Wood, 188; Wilson v. Tesson, 12 Ind. 285; Commercial Bank v. Lockwood, 2 Har. (Del.) 8.

§ 198. By legislative act.—In England, the crown may create, but cannot at pleasure dissolve, a corporation, or, without its consent, alter or amend its charter.¹

But parliament, being theoretically omnipotent, may do this, although there are but a few instances of the power having ever been exercised.² In this country, the legislature cannot dissolve a private corporation, whether civil or eleemosynary, without its consent,³ except in cases where the power to repeal is reserved.⁴ Such reserved power may exist either in the charter, in the general acts for incorporation, in the general laws of the state, or in the constitution of the state.⁵ And the power may be qualified, or it may be unqualified.⁶ But in all cases, the power is one which should be exercised with the greatest moderation and caution.⁷ And a corporation cannot be divested of any of the essential rights and privileges conferred by its charter, under the pretense of police regulations.⁸ As it respects public or municipal corporations, the legislature has supreme power over them,⁹ and may increase or diminish their corporate powers, enlarge or reduce their privileges, or annul their corporate existence, as, in its judgment, the general good requires,¹⁰ and irrespective of consent or objection on the part of the inhabitants of the municipality.¹¹ And where a private corporation, and a municipal corporation within the limits of the territory of the former, were created by the same act, it was held that the charter of the latter might be repealed by the legislature, without reference to the former.¹² But grants of property and of franchises to public corporations, coupled with an interest, are beyond legislative control equally with the property of private corporations.¹³

1 See *Regents etc. v. Williams*, 9 Gill & J. 365; *Dartmouth Coll. v. Woodward*, 4 Wheat. 657; *Smith's Case*, 4 Mod. 54.

2 *Rex v. Amery*, 2 Term Rep. 568; and see *Vanhorne v. Dorrance*, 2 Dall. 307; *County Comm'rs v. Cox*, 6 Ind. 403; *Lea v. American etc. Canal Co.* 3 Abb. Pr. N. E. 1.

3 *Dartmouth Coll. v. Woodward*, 4 Wheat. 518; *Allen v. McKeen*, 1 Sum. 276; *City of Louisville v. University of Louisville*, 15 B. Mon. 642; *Flint etc. Plank R. Co. v. Woodhull*, 25 Mich. 99; *Allen v. Buchanan*, 9 Phila. 263; *Hamilton v. Keith*, 5 Bush, 458; *Mobile etc. R. R. Co. v. Mosely*, 52 Miss. 127; *Woodfork v. Union Bank*, 3 Cold. 438. Compare *State v. South etc. R. R. Co.* 24 Tex. 80; *Toledo Bank v. Bond*, 1 Ohio St. 622.

4 *Suydam v. Moore*, 8 Barb. 356; *Matter of Reciprocity Bank*, 22 N. Y. 9; 29 Barb. 369; *Bangor Railw. Co. v. Smith*, 47 Me. 34; *Erie Railw. Co. v. Casey*, 26 Pa. St. 287; *Del. etc. Railw. Co. v. Tharp*, 5 Har. (Del.) 454; *West Wis. R. R. Co. v. Supervisors etc.*, 35 Wis. 257.

5 See *Del. etc. Railw. Co. v. Tharp*, 5 Har. (Del.) 454; *Lothrop v. Steadman*, 13 Blatchf. 134; *State v. Commissioners etc.*, 37 N. J. L. 228; *Hyatt v. McMahon*, 25 Barb. 457; *Holyoke Co. v. Lyman*, 15 Wall. 560; *Griffin v. Ky. Ins. Co.*, 3 Bush, 592; *Union Pacif. Railw. Co. v. United States*, 20 Alb. L. J. 365, 369.

6 *Erie etc. R. R. v. Casey*, 26 Pa. St. 287; *Mayor etc. v. Pittsburgh etc. R. R. Co.*, 1 Abb. U. S. 9; *State v. Bradford*, 32 Vt. 50; *People v. Dispensary etc. Soc.*, 7 Lans. 305; *State v. Pawtuxet Turnp. Co.*, 8 R. I. 182.

7 *People v. Oakland Co. Bank*, 1 Doug. (Mich.) 286; *Commonw. v. Essex Co.*, 13 Gray, 239; *Del. etc. R. R. Co. v. Tharp*, 5 Har. (Del.) 454; *Compare Sala v. New Orleans*, 2 Woods, 188; *Lothrop v. Steadman*, 43 Conn. 563.

8 *Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191.

9 *St. Louis v. Russell*, 9 Mo. 507; *People v. Wren*, 4 Scam. 273; *Mokin v. Odum*, 3 Bland, 407; *Underhill v. Trustees etc.*, 17 Cal. 172; *Stibb v. Indianapolis*, 55 Ind. 515; *Matter of Clinton St.*, 2 Brewst. 599; *People v. Common Council of Chicago*, 51 Ill. 58.

10 *Martin v. Dix*, 52 Miss. 53; *San Francisco v. Canavan*, 42 Cal. 541; *City v. Shields*, 52 Mo. 351; *New Orleans v. Caselar*, 27 La. An. 156; *Barnes v. Dist. of Columbia*, 91 U. S. 540.

11 *Girard v. Philadelphia*, 7 Wall. 1; *State Bank v. Knoop*, 16 How. 269; *People v. Morris*, 13 Wend. 325; *Jersey City v. Railway Co.*, 20 N. J. Eq. 360; *North Yarmouth v. Skillings*, 45 Me. 133.

12 *City of Paterson v. Soc. for Manufacturers etc.*, 4 Zab. 335.

13 *Bailey v. Mayor etc.*, 3 Hill, 541; *Dartmouth Coll. v. Woodward*, 4 Wheat. 653; and see *New Orleans etc. R. R. Co. v. New Orleans*, 28 La. An. 478; *De Voss v. Richmond*, 18 Gratt. 338; *Gas Co. v. San Francisco*, 9 Cal. 453; *Park Comm'rs v. Detroit*, 28 Mich. 228; *Milner v. Pensacola*, 2 Woods, 632.

§ 199. By loss of members.—A corporation aggregate is clearly dissolved by the death of all of its members.¹ And if a corporation consists of several integral parts, and some of those are gone, and the remaining parts have no power to supply the deficiency, the corporation is dissolved.² But no loss of members destroys a corporation, so long as a sufficient number remain to continue the succession, and to fill vacancies.³ If a corporation is not dead, but merely lacks the means for the exercise of its powers, the legislature may supply such means by filling vacancies.⁴ A private corporation does not become dormant because a single individual becomes sole owner of the corporate property and franchises by a purchase of the stock.⁵ If such sole owner continues the business

under the corporate name, without notice to the public, he may still be sued as such corporation.⁶ If, pursuant to an agreement, two individuals purchase all the shares in a manufacturing company, this does not dissolve the company.⁷ The legal title in the corporation remains, although the individual members change.⁸

1 *Hodson v. Copeland*, 16 Me. 314; *Chesapeake Canal Co. v. Ohio R. E. Co.* 4 Gill & J. 1; *Boston Glass Manuf. v. Langdon*, 24 Pick. 52; *Rex v. Morris*, 4 East, 17; and see *Kennet etc. Nav. Co. v. Witherington*, 18 Q. B. 531.

2 *Phillips v. Wickham*, 1 Paige, 590; *Smith v. Smith*, 3 Desaus. Eq. 557; *McIntire Poor School v. Zanesville etc. Co.* 9 Ohio, 203.

3 *State v. Trustees etc.* 5 Ind. 77; and see *Curien v. Santini*, 16 La. An. 27.

4 See *Lea v. American etc. Canal Co.* 3 Abb. Fr. N. S. 1; *Mayor etc v. Brook*, 7 Q. B. 339.

5 *Newton etc. Co. v. White*, 42 Ga. 143.

6 *Newton etc. Co. v. White*, 42 Ga. 143; and see *Cook v. Kent*, 105 Mass. 246.

7 *Russell v. McLellan*, 14 Pick. 63.

8 *Russell v. McLellan*, 14 Pick. 63; and see *Wilde v. Jenkins*, 4 Paige, 481.

§ 200. Effect of omission to elect officers.—The managers and officers of a private business corporation do not form an integral part of a corporation,¹ and an omission to elect them does not work a dissolution of the corporation;² nor does it afford a sufficient reason for not making the corporation a party defendant in an action.³ The exercise of the powers of the corporation may, however, be suspended by such omission,⁴ until its functions are restored by subsequent election.⁵ The existence of a corporation is not destroyed by the resignation of all its officers and agents;⁶ its rights are only dormant until the deficiency is supplied.⁷

1 *Rose v. Turnp. Co.* 3 Watts, 46.

2 *Hoboken Build. Assoc. v. Martin*, 2 Beas. 427; *Evarts v. Killingworth Manuf. Co.* 20 Conn. 447; *Commonw. v. Cullen*, 13 Pa. St. 133; *Blake v. Hinkle*, 10 Yerg. 218; *Knowlton v. Ackley*, 8 Cush. 93. The acts of the officers holding over are valid: *St. Louis etc. Loan Assoc. v. Augustine*, 2 Mo. App. 123. See *People v. Twaddell*, 18 Hun, 427; *Harris v. Miss. Valley etc. R. R.* 51 Miss. 602.

3 *Allen v. N. J. South. R. R. Co.* 49 How. Pr. 14.

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4 *Vincennes University v. Indiana*, 14 How. 263; *Nashville Bank v. Petway*, 3 Humph. 524.

5 *Rose v. Turnp. Co.* 3 Watts, 46; *Smith v. Smith*, 3 Desaus. Eq. 557; *Harris v. Miss. Valley etc. R. R. Co.* 51 Miss. 602.

6 *Muscatine Turnverein v. Funck*, 18 Iowa, 469; *Evarts v. Killingworth*, 20 Conn. 447.

7 *Phillips v. Wickham*, 1 Paige, 380; and see *Lea v. American etc. Canal Co.* 3 Abb. Pr. N. S. 1.

§ 201. By voluntary surrender of franchises.—

It is well-settled in this country that a private corporation may subject itself to dissolution by a voluntary surrender of its corporate rights and franchises.¹ But the officers of a corporation cannot dissolve it without the assent of the great body of the society.² A majority of the members may, however, by resolution, surrender the corporate franchises,³ unless the charter provides otherwise,⁴ or a time is specified for which the enterprise must be continued.⁵ The dissent of one stockholder should not be allowed to prevent a surrender desired by all the other members of the company.⁶ But it is a general rule that a surrender of a charter, even by a unanimous vote,⁷ must be accepted by the state, in order to effect a dissolution of the corporation.⁸ The exceptions to the rule are cases where, by the act of incorporation, the stockholders are made individually liable for the debts of the corporation.⁹ A surrender may be implied from acts suffered by a corporation to be done, which destroy the end and objects for which it was created;¹⁰ as where a corporation suffered all its property to be sold on execution, and the trustees surrendered their trust, and omitted the annual election of officers, the court, in behalf of creditors, presumed a surrender of the corporate rights, and a dissolution of the corporation from that time.¹¹ But mere non-user of its franchises by a corporation is not a surrender.¹²

1 *Penobscot Boom Co. v. Lamson*, 16 Me. 224; *Enfield Toll Bridge Co. v. Conn. River Co.* 7 Conn. 29, 45; *Washington etc. Road v. State*, 19 Md. 339; *Savage v. Walshe*, 26 Ala. 691; *People v. Pres. etc. of Coll. of Cal.* 39 Cal. 166; *Mobile etc. R. R. Co. v. State*, 29 Id. 573; *Att.-Gen. v. Clergy Soc.* 10 Rich. Eq. 604; *McLaren v. Pennington*, 1 Paige, 103, 107; and see *Ward v. Soc. of Attorneys*, 2 Coll. 370.

2 *Smith v. Smith*, 3 Dessaus. Eq. 557; and see *Lake Ontario Nat. Bank v. Onondaga County Bank*, 7 Hun. 549.

3 *McCurdy v. Myers*, 44 Pa. St. 425; *Zabriskie v. Hackensack Railw. Co.* 3 Green C. E. 153; *Black v. Del. etc. Canal Co.* 7 Id. 404; *Treadwell v. Salisbury Manuf. Co.* 7 Gray, 333; *Revere v. Boston Copper Co.* 15 Pick. 351; and see *London Suburban Bank*, Law R. 6 Ch. 641; *Suburban Hotel Co.*, Law R. 2 Ch. 737; *Joint-stock Coal Co.*, Law R. 8 Eq. 146. But see *Polar Star Lodge v. Polar Star Lodge*, 16 La. An. 53; *Curien v. Santini*, 16 Ill. 27; *Kean v. Johnston*, 9 N. J. Eq. 401.

4 See *Black v. Del. etc. Canal Co.* 22 N. J. Eq. 404.

5 *Von Schmidt v. Huntington*, 1 Cal. 55.

6 *Wilson v. Proprietors etc.* 9 R. I. 590.

7 *Wilson v. Proprietors etc.* 9 R. I. 590.

8 *Wilson v. Proprietors etc.* 9 R. I. 570; *Boston Glass Co. v. Langdon*, 24 Pick. 41; *N. Y. Marbled Iron Works*, 4 Duer, 362; *Harris v. Muskingum Manuf. Co.* 4 Blackf. 267; *Mechanics' Bank v. Heard*, 37 Ga. 491.

9 *La Grange etc. R. R. Co. v. Rainey*, 7 Cold. 420.

10 *People v. Hudson*, 6 Cowen, 217; *Moore v. Whitcomb*, 48 Mo. 543; *Strickland v. Prichard*, 37 Vt. 324; *Webster v. Turner*, 12 Hun, 264.

11 *Slec v. Bloom*, 19 Johns. 456; 10 Am. Dec. 273.

12 See *Brinkerhoff v. Brown*, 7 Johns. Ch. 217; *Bradt v. Benedict*, 17 N. Y. 33; *Rollins v. Clay*, 33 Me. 132; *Brandon Iron Co. v. Gleason*, 24 Vt. 228; *De Camp v. Alward*, 52 Ind. 463; *Baptist Meeting House v. Webb*, 66 Me. 386; *West v. Carolina etc. Ins. Co.* 31 Ark. 476.

§ 202. Effect of insolvency.—The insolvency of a corporation cannot extinguish its legal existence.¹ Mere insolvency neither impairs the power of the corporation to manage its affairs,² nor converts its property into a trust fund for the benefit of its creditors.³ Nor does the fact that a corporation is insolvent, authorize it to apply to a court of equity for a receiver to wind up its affairs.⁴ Such appointment will only be made at the instance of a creditor.⁵ A corporation, like an individual, is insolvent when it is not able to pay its debts.⁶

1 *Nimmons v. Tappan*, 2 Sweeny, 632; *Boston Glass Manufactory v. Langdon*, 24 Pick. 49.

2 *Pondville Co. v. Clark*, 24 Conn. 97.

3 *Catlin v. Eagle Bank*, 6 Conn. 233; and see *People v. Bank of Hudson*, 6 Cowen, 217.

4 *Hugh v. McRae*, Chase Dec. 466.

5 *Hugh v. McRae*, Chase Dec. 466; and see *Moss v. Harpeth Academy*, 7 Helsk. 283.

6 *Brouwer v. Harbeck*, 9 N. Y. 589; *Hazelton v. Allen*, 3 Allen, 114.

§ 203. By forfeiture of charter.—A private corporation may be dissolved by a forfeiture of its charter,

through abuse or neglect of its franchise, as if for condition broken, or for a breach of trust.¹ It is a tacit condition annexed to the creation of every such corporation, that its franchise will be forfeited by a misuser or a non-user of them.² And where a statute provides for the dissolution of a corporation in a particular manner, this does not exclude the jurisdiction of the court to decree a dissolution in case of misconduct.³ But acts which are improper do not of themselves work a dissolution.⁴ The corporation, nevertheless, continues legally to exist until the state or government which created it shall, by a proper proceeding, procure an adjudication, and enforce a forfeiture of the charter.⁵ And even where the terms of a charter are, that the corporation shall be dissolved on the nonperformance of a condition, the mere failure to perform is not, *ipso facto*, a dissolution.⁶ It is a cause of forfeiture to be taken advantage of by the state in a proceeding instituted for that purpose, and must be judicially determined.⁷ A corporation which has been enjoined from the exercise of its corporate franchises and deprived of its property may be dormant, but is not actually dissolved.⁸ To effect a dissolution there must be the judgment of a court of competent jurisdiction.⁹ To warrant a forfeiture requires something more than accidental negligence, or excess of power, or mere mistake in the mode of exercising an acknowledged power.¹⁰ There must, in general, be some plain abuse of power by which the corporation fails to fulfill the design and purpose of its organization.¹¹ The acts of misuser or non-user must relate to the matters which are of the essence of the contract between the sovereign and the corporation, and they must be willful and repeated to cause a forfeiture.¹² An isolated act of nonfeasance not committed willfully, and not producing or tending to produce mischievous consequences to any one, nor contrary to express requisitions of the charter, will not be a ground of forfeiture;¹³ and a reasonable and substantial performance of the conditions

is all that is required to defeat a claim to a forfeiture.¹⁴ Long-continued neglect on the part of a turnpike company to repair its road is a willful, deliberate act, in violation of its plain duty, which warrants a judicial decree of forfeiture of its charter.¹⁵ So, if bridges are necessary to render the road passable, and a bridge is carried away by a sudden flood, such a company must rebuild it within a reasonable time, or they will forfeit their charter.¹⁶ An abuse in a particular department of an entire franchise is cause of forfeiture of the whole franchise;¹⁷ but where a particular franchise is added to a corporation subsequent to its first creation, such franchise may be forfeited and the residue remain.¹⁸ A cause of forfeiture can be enforced against a corporation only by a *scire facias*, or an information in the nature of a *quo warranto*,¹⁹ issued at the instance of the government creating the corporation,²⁰ and cannot be taken advantage of incidentally,²¹ or in any other way,²² or by an individual.²³ The grounds of forfeiture may be waived by the state, the same as an individual may waive breaches of contract.²⁴ And an act of the legislature passed, with notice of the grounds of forfeiture, which recognizes the corporation as still existing notwithstanding them, operates as a waiver.²⁵ An act extending the time of a railway company to complete its road, provided the same is not sold, waives a forfeiture already incurred by a failure to complete in the time originally prescribed, except in the event of a sale of the road.²⁶ But, as a general rule, an act of the legislature will not be deemed a waiver, unless the legislative intent in that respect be expressly declared, or is necessarily implied.²⁷ The forfeiture of a charter can only be enforced in the courts of the state by which the charter was granted.²⁸ And the question whether a corporation has forfeited its charter is one solely for the determination of a court of law.²⁹ A court of equity cannot decree a forfeiture unless it be specially empowered by statute.³⁰

1 Terrett v. Taylor, 9 Cranch. 43; Towar v. Hale, 46 Barb. 361; People v. Dispensary etc., Soc. 7 Lans. 304; City of London v. Vannacre, 12

Mod. 271; *State Bank v. State*, 1 Blackf. 270; *People v. Bank of Niagara*, 6 Cowen, 198; *Boston Glass Manuf. v. Langdon*, 24 Pick. 52; *President etc. v. Conaly*, 16 Serg. & R. 145.

2 *Terrett v. Taylor*, 9 Cranch, 43; and see *Mobile etc. R. R. Co. v. State*, 29 Ala. 573; *Commonw. v. Blue Hill Turnp. Co.* 5 Mass. 430, 423; *Commonw. v. Commercial Bank*, 28 Pa. St. 383; *Eastern Archipelago Co. v. Reginam*, 3 El. & B. 857.

3 See *State Bank v. State*, 1 Blackf. 267; *Bradt v. Benedict*, 17 N. Y. 83; *Kiuder v. Taylor*, 3 Law J. 68.

4 *Ormsby v. Vt. etc. Min. Co.* 65 Barb. 360.

5 *Ormsby v. Vt. etc. Min. Co.* 65 Barb. 360; and see *West v. Carolina etc. Ins. Co.* 31 Ark. 476; *Baltimore v. Pittsburg etc. R. R. Co.* 1 Abb. U. S. 9; *Turnpike Co. v. State*, 3 Wall. 210; *Att.-Gen. v. Tudor Ice Co.* 104 Mass. 239; *State v. Commercial Bank*, 33 Miss. 474; *Commonw. v. Flitchburg R. R. Co.* 13 Gray, 180; *State v. Urbana Ins. Co.* 14 Ohio St. 6.

6 *Matter of Ref. Presb. Church*, 7 How. Pr. 476; *Chesapeake etc. Canal Co. v. Ohio R. R. Co.* 4 Gill & J. 1; *People v. Manhattan Co.* 9 Wend. 351.

7 *State v. Fagan*, 22 La. An. 545; *La Grange etc. R. R. Co. v. Rainey*, 7 Cold. 420; *Nevitt v. Bank of Port Gibson*, 6 Smedes & M. 513; *Light v. N. Y. Elevated R. R. Co.* 49 How. Pr. 20; *Atcaafalaya Bank v. Dawson*, 13 La. An. 497; but see *Matter of Brooklyn etc. Railw. Co.* 72 N. Y. 245.

8 *Kincaid v. Dwinelle*, 59 N. Y. 548.

9 *Kincaid v. Dwinelle*, 59 N. Y. 548; and see *Bruffett v. Great Western R. R. Co.* 23 Ill. 333; *Baker v. Bacus*, 32 Id. 79; *Matter of N. Y. Bridge Co.* 67 Barb. 285; *People v. President of Manhattan Co.* 9 Wend. 351.

10 *Harris v. Miss. Valley etc. R. R. Co.* 51 Miss. 602; *State v. Pawtuxet Turnp. Co.* 8 R. I. 182; and see *Regents of the University etc.* 9 Gill & J. 365; *Att.-Gen. v. Bank of Niagara*, 1 Hopk. Ch. 354; *State v. Urbana etc. Ins. Co.* 14 Ohio, 6; *Cuthin v. Eagle Bank*, 6 Conn. 233; *Commonw. v. Franklin Ins. Co.* 115 Mass. 278.

11 *Harris v. Miss. Valley etc. R. R. Co.* 51 Miss. 602; *Ward v. Sea Ins. Co.* 7 Paige, 294; *State v. Merchants' Ins. Co.* 8 Humph. 225.

12 *Harris v. Miss. Valley etc. R. R. Co.* 51 Miss. 602.

13 *People v. Bristol Turnp. Co.* 23 Wend. 222; *Frederick Female Seminary v. State*, 9 Gill, 379; *Paschall v. Whitsett*, 11 Ala. 472; *Att.-Gen. v. Petersburg etc. R. R. Co.* 6 Ired. 456; *People v. Kingston etc. Turnp. Co.* 23 Wend. 193; *State v. Pawtuxet Turnp. Co.* 8 R. I. 182.

14 *People v. Williamsburg Turnp. Co.* 47 N. Y. 586; *People v. Kingston Turnp. Co.* 23 Wend. 183.

15 *State v. Royalton etc. Turnp. Co.* 11 Vt. 431; *State v. Pawtuxet Turnp. Co.* 8 R. I. 182, 521.

16 *People v. Hillsdale etc. Turnp. Co.* 23 Wend. 254.

17 *People v. Bristol etc. Turnp. R.* 23 Wend. 222.

18 *People v. Bristol etc. Turnp. R.* 23 Wend. 222; and see *Grand Rapids Bridge Co. v. Prange*, 35 Mich. 400.

19 See *State v. Consolidation Coal Co.* 46 Md. 1; *State v. Cincinnati*, 23 Ohio St. 445; *State v. Bradford*, 32 Vt. 50; *Turnp. Co. v. State*, 3 Wall. 210; *State v. White's Creek Turnp. Co.* 3 Tenn. Ch. 163; *Commonw. v. Small*, 26 Pa. St. 31; *People v. Bank of Hudson*, 6 Cowen, 217. *A strict facias* is proper where there is a legal existence capable of acting, but who have been guilty of an abuse of the power intrusted to them; and

a *quo warranto* is necessary where there is a corporate body *de facto*, who take upon themselves to act as a body corporate, but, from some defect in their constitution, they cannot legally use the powers they affect to use: *Per Ashurst, J.*, in *Rex v. Passmore*, 3 Term Rep. 189; and see *Regents etc. v. Williams*, 9 Gill & J. 365; *Commonw. v. U. S. Bank*, 21 Ashm. 349. As to the mode of procedure in New York: see *Wilmeradoeff v. Lake Mahopac Co.* 18 Hun. 387.

20 *Commonw. v. Farmers' Bank*, 2 Grant Cas. 392; *Planters' Bank v. Bank of Alexandria*, 10 Gill & J. 346; *Hammett v. Little Rock etc. R. R. Co.* 20 Ark. 204; *Commonw. v. Alleghany Bridge Co.* 20 Pa. St. 185; *Mac-kall v. Chesapeake etc. Canal Co.* 84 U. S. 308; *Baker v. Backus*, 32 Ill. 79; *Brookville Co. v. McCarty*, 8 Ind. 392; *Taggart v. Western Md. R. R. Co.* 24 Md. 563; *Gilman v. Greenpoint Sugar Co.* 61 Barb. 9; 4 Lau. 482; *Gaylord v. Fort Wayne etc. R. R. Co.* 6 Biss. 238.

21 *President etc. v. Hamilton*, 34 Ind. 506; *Hudgins v. State*, 46 Ala. 208; *Spring Valley Water Works v. San Francisco*, 23 Cal. 434; *Pearce v. Olney*, 20 Conn. 544; *Crumph. U. S. Min. Co. 7 Gratt. 352*; *Bank of Mo. v. Snelling*, 35 Mo. 190; *Buffalo etc. R. R. Co. v. Cary*, 28 N. Y. 75; *Duke v. Cahawba Nav. Co.* 16 Ala. 372; *Union Branch R. R. Co. v. East Tenn. etc. R. R. Co.* 14 Ga. 327; *Bohannon v. Binns*, 31 Miss. 355; *Conn. etc. R. R. Co. v. Bailey*, 24 Vt. 465; *N. Y. Elevated R. R. Co. 70 N. Y. 327*; 7 Hun. 230; *N. J. etc. R. R. Co. v. Long Branch Comm'rs*, 39 N. J. L. 28.

22 See *Coyle v. Pittsburgh Female College*, 40 Pa. St. 439; *Receivers etc. v. Renick*, 15 Ohio, 323; *Trustees etc. v. Hills*, 6 Cowen, 23; *Chesapeake Canal Co. v. Ohio R. R. Co.* 1 Gill & J. 1; *Mechanics' Build. Assoc. v. Stevens*, 5 Duer. 676.

23 *United States v. Williams*, 5 Oranch C. C. 62; *State v. Fourth N. H. Turnp.* 15 N. H. 162; *Frost v. Frostburg Coal Co.* 24 How. 278; *Charles River Bridge v. Warren Bridge*, 7 Pick. 344; *Chesapeake Canal Co. v. Ohio R. R. Co.* 4 Gill & J. 1.

24 *People v. Manhattan Co.* 9 Wend. 351; *Chesapeake etc. Canal Co. v. Ohio R. R. Co.* 4 Gill & J. 1; *Commonw. v. Union etc. Ins. Co.* 5 Mass. 230; *Board of Comm'rs etc. v. State*, 9 Gill, 379. But the power to waive a forfeiture is confined to the legislature; the act of the governor and senate cannot operate as a waiver: *People v. Phoenix Bank*, 24 Wend. 431.

25 *McConaby v. Turnp. Co.* 1 Pa. 428; *Baltimore etc. R. R. Co. v. Supervisors etc.* 3 West Va. 319; *Commercial Bank v. State*; 6 Smedes & M. 599; *State v. Miss. etc. R. R. Co.* 20 Ark. 495; *Kishacoquillas etc. Turnp. Co. v. McConaby*, 16 Serg. & R. 140.

26 *LaGrange etc. R. R. Co. v. Rainey*, 7 Cold. 420.

27 *Peirce v. Somersworth*, 10 N. H. 375; *Heard v. Talbot*, 7 Gray, 120; *People v. Kingston etc. Turnp. Co.* 23 Wend. 193.

28 *Importing etc. Co. v. Locke*, 50 Ala. 332; *Barclay v. Talman*, 4 Edw. Ch. 123; *People v. Soc. for Propagating the Gospel*, 1 Paine C. C. 653; and see *Murray v. Vanderbilt*, 39 Barb. 140. Compare *Hart v. Boston etc. R. R. Co.* 40 Conn. 524.

29 *Baker v. Backus*, 32 Ill. 79; *Doyle v. Peerless etc. Co.* 44 Barb. 239; *Fres. etc. v. Trenton Bridge Co.* 13 N. J. Eq. 46; *Att.-Gen. v. Utica Ins. Co.* 2 Johns. Ch. 371; *Att.-Gen. v. Tudor Ice Co.* 104 Mass. 239.

30 *Att.-Gen. v. Stevens*, Saxt. Ch. 369; *State v. Merchants' Ins. etc. Co.* 8 Humph. 253.

§ 204. **Transfer of assets.**—The sale or assignment of the corporate property does not necessarily dissolve the corporation or operate as a surrender of its franchise.¹

But a corporation, owing no debts, may, by a unanimous resolution of the stockholders, dispose of its entire property and declare itself dissolved, and this is equivalent to a surrender of its franchise.² Provision by statute for the dissolution of a corporation, by a mortgage sale of its franchise and property, does not end the corporate existence till after a legal and valid sale.³ And a corporation has no power, against the dissent of a minority of the stockholders, to transfer all its property and thus terminate its existence, taking in payment therefor the stock of a foreign corporation carrying on the same business.⁴ Surrendering the property of a corporation into the hands of a receiver, does not abate, continue, or bar an action pending against it.⁵ An assignment by a corporation for the benefit of creditors, is not obnoxious to the statutes of 13 and 27 Eliz., unless the intention to hinder or delay creditors is clearly apparent.⁶

1 *Barclay v. Talman*, 4 Edw. Ch. 123; *DeCamp v. Alward*, 83 Ind. 463; *Smith v. Gowan*, 2 Duval, 17; *Rollins v. Clay*, 33 Me. 132; *Kansas City Hotel Co. v. Sauer*, 65 Mo. 279.

2 *Webster v. Turner*, 12 Hun, 264; and see *Bradt v. Benedict*, 17 N. Y. 93; *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. 473; *Graham v. Railroad Co.* 162 U. S. 143.

3 *White Mountains R. R. v. White Mountains R. R.* 50 N. H. 50.

4 *Taylor v. Earle*, 8 Hun, 1; and see *Prothingham v. Barney*, 6 id. 366; *Blatchford v. Ross*, 64 Barb. 42.

5 *Toledo etc. Railw. Co. v. Beggs*, 85 Ill. 80.

6 *McCallie v. Walton*, 37 Ga. 611. See *Baltimore etc. R. R. Co. v. Glenn*, 24 Md. 287; *Clark v. Titcomb*, 42 Barb. 122; *Hopkins v. Gallatin Turnp. Co.* 4 Humph. 403.

§ 205. **Non-user.**—A corporation is not actually dissolved by mere non-user, or a cessation of all corporate acts.¹ To effect a dissolution, there must be the judgment of a court of competent jurisdiction.² A mere resolution not to proceed with business is not enough, so long as the company still has the necessary appliances, etc., with which to proceed.³ And an answer which sets up the forfeiture of the plaintiff's charter by non-user, but which does not aver that a forfeiture has been declared by judicial proceedings for that purpose, is insufficient on de-

murrer.⁴ Failure on the part of the corporators to organize under the charter, is not such a non-user as will warrant the institution of quo warranto proceedings to vacate the charter.⁵

¹ Att.-Gen. v. Bank of Niagara, Hopk. Ch. 354; Baptist Meeting House v. Webb, 66 Me. 398; Rollins v. Clay, 33 Id. 132; Harris v. Nesbit, 24 Ala. 398.

² Mickles v. Rochester City Bank, 11 Paige, 118; Kincaid v. Dwinnelle, 59 N. Y. 548; Stoooper v. Greensburgh etc. Plank R. R. Co. 10 Ind. 47; Smith v. Metrop. Gas Light Co. 12 How. Pr. 187; Paliquoque Bank v. Bethel Bank, 36 Conn. 325.

³ Bradt v. Benedict, 17 N. Y. 93.

⁴ West v. Carolina etc. Ins. Co. 31 Ark. 478.

⁵ State v. Simonton, 78 No. Car. 57. Compare People v. Troy House Co. 44 Barb. 625; Phillips v. Wickham, 1 Paige, 509.

§ 206. **Dissolution by winding-up.**—In most, if not all the states, there are statutory provisions relating to the dissolution of corporations and the winding-up of their affairs, as to which, the statute of the particular state should be consulted.¹ Generally, under such provisions, the corporate functions are continued after dissolution, for the purpose of settling the corporate affairs, and to protect the rights of creditors and others.² But in the absence of statutory regulations, the rights of creditors are in most cases sufficiently protected by the equitable rule, that the corporate funds are held in trust for creditors, and in case of dissolution may be followed into the hands of any party, except such as are *bona fide* purchasers without notice.³ Under the English acts, the winding-up may take place either involuntarily by order of the court of chancery,⁴ or voluntarily, without the intervention of any tribunal.⁵ The court will not, at the instance of contributors, interfere with a voluntary winding-up, unless the resolution for winding-up voluntarily has been obtained by fraud, or by an inequitable overbearing of the rights of a dissident minority by improper influence.⁶

¹ See Iowa Code, § 1074; Mass. Gen. Stat. 398; §§ 35-39; Re Franklin Tel. Co. 119 Mass. 447; 1 N. Y. Stat. at Large (Edm. ed.) 537; 2 Id. 458; Stat. of Ill. p. 577, § 25; Fisher v. World etc. Ins. Co. 15 Abb. Pr. N. S. 383; 47 How. Pr. 451; People v. Central City Bank, 53 Barb. 412; Mooney v. British Commercial Life Ins. Co. 9 Abb. Pr. N. S. 103.

2 See *Stetson v. City Bank*, 12 Ohio St. 577; *McGoon v. Scales*, 9 Wall. 23; *Mariners' Bank v. Sewall*, 50 Me. 220; *Muscatoine Turn Verein v. Lunk*, 18 Iowa, 489; *Thornton v. Mary. Freight Railw. Co.* 124 Mass. 32.

3 *Shamokin Valley R. R. Co. v. Malone*, 85 Pa. St. 25; *Hastings v. Drew*, 50 How. Pr. 234; *Fiske v. Union Pacif. R. R. Co.* 10 Blatchf. 518; *Marr v. Bank of West Tenn.* 4 Cold. 471; *Wood v. Dummer*, 3 Mason C. C. 208; *Reid v. Eatonton Manuf. Co.* 40 Ga. 98; *Sawyer v. Hoag*, 17 Wall. 610; *Crease v. Babcock*, 23 Pick. 334.

4 See Stat. 25 and 26 Vict. chap. 89, § 79; *Re Spence's Patent etc. Co. Law R. 9 Eq. 9*; *Re Trent and Humber Co. Law R. 4 Ch. 112*; *Ex parte Fox*, *Law R. 6 Ch. 176*.

5 See Stat. 25 and 26 Vict. chap. 89, § 129; *Re Exmouth Docks Co. Law R. 17 Eq. 181*; *Re Sanderson's Pat. Assoc. Law R. Eq. 188*; *Re Bradford Nav. Co. Law R. 10 Eq. 331*; *Princess of Reass v. Bos*, *Law R. 5 H. L. 178*; *Re Commercial Bank of England*, *Law R. 6 Eq. 517*; *Re London India Rubber Co. Law R. 1 Ch. 329*; *Re Pen-y-van Colliery Co. Law R. 6 Ch. Div. 477*; *Re United Service Co. Law R. 7 Eq. 76*. As to the winding-up of unregistered companies: see stat. 25 and 26 Vict. chap. 89, § 189; *St. James' Club*, 2 DeGex M. & G. 383; *Re South Wales etc. Steamship Co. 2 Ch. Div. 763*.

6 *Re Beaujolais Wine Co. Law R. 3 Ch. 15*; *Re London etc. Discount Co. Law R. 1 Eq. 277*.

§ 207. Effect of dissolution, in general.—By the strict rules of the common law, upon the dissolution or civil death of a corporation, all real estate held by it at the time reverted to the grantor and his heirs;¹ all the personal property became vested in the crown,² or, in this country, in the people or state;³ all debts due to and from the corporation become extinguished;⁴ and all suits pending for or against it abated.⁵ Modern legislation has to a great extent modified these common-law rules,⁶ and, in this country, they have been generally rejected as to private moneyed corporations, even in the absence of statutory provisions on the subject.⁷ The sound doctrine now is, as shown by statutes and judicial decisions, that the capital and debts of moneyed corporations constitute a trust fund and pledge for the payment of creditors and stockholders, and a court of equity will lay hold of the fund and see that it be duly collected and applied.⁸ The creditors may enforce their claims against any property belonging to the corporation which has not passed into the hands of a *bona fide* purchaser;⁹ and they have a lien or right of priority of payment, in preference to the stockholders.¹⁰ So, debts due a moneyed corporation do not

become extinct upon its dissolution.¹¹ A corporation may be regarded as dissolved for certain purposes, so far as to be incapable of doing injury to the public, and yet retain its vitality so far as may be necessary for the protection of the rights of others.¹² It is now the prevailing doctrine, that where lands are conveyed absolutely to a corporation having stockholders, no reversion, or possibility of a reversion, remains in the grantor.¹³ And it is within the power of a state to enact laws enabling its citizens to subject the lands of a foreign corporation, after dissolution, to the payment of debts which the corporation owes to such citizens.¹⁴

1 Att.-Gen. v. Gower, 9 Mod. 224; Colchester v. Seaber, 3 Burr. 1866; Bligham v. Weiderwax, 1 N. Y. 509; State v. Elvers, 5 Ired. 297; White v. Campbell, 5 Humph. 38; and see Acklin v. Paschal, 48 Tex. 147.

2 Co. Lit. 13 b; Rex v. Pasmore, 3 Term Rep. 199.

3 State Bank v. State, 1 Blackf. 267; Fox v. Horah, 1 Ired. Eq. 358; Erie R. R. Co. v. Casey, 26 Pa. St. 287.

4 Colchester v. Seaber, 3 Burr. 1866; Miami Exporting Co. v. Gano, 13 Ohio, 291; Mallory v. Mallett, 6 Jones Eq. 345; President etc. v. Moore, 13 Sineces & M. 157.

5 Greely v. Smith, 3 Story, 657; Carey v. Giles, 10 Ga. 9; Merrill v. Suffolk Bank, 31 Me. 17; Saltmarsh v. Planters' Bank, 17 Ala. 761.

6 See Stetson v. City Bank, 12 Ohio St. 577; Tuskaloosa etc. Assoc. v. Green, 48 Ala. 346; Mariners' Bank v. Sewall, 50 Me. 220; Heyward v. Mayor etc. 1 N. Y. 314.

7 See Mumma v. Potomac Co. 8 Peters, 281; Bacon v. Robertson, 18 How. 480; Reed v. Frankford Bank, 23 Me. 318; Commonw. v. Roxbury, 9 Gray, 510; Towar v. Hale, 46 Barb. 361.

8 2 Kent Com. 307 n.; Houghton v. Thornton, 8 Ga. 491; Robinson v. Lane, 19 Id. 337; Wood v. Dummer, 3 Mas. C. C. 308; Lea v. American etc. Canal Co. 3 Abb. Fr. N. S. 1; Nathan v. Whitlock, 9 Paige, 152; Lothrop v. Stedman, 13 Blatchf. 134; Blake v. Railroad Co. 39 N. H. 435; and see § 206, *ante*.

9 Bartlett v. Drew, 57 N. Y. 587; 4 Lans. 444; 60 Barb. 648; Hastings v. Drew, 50 How. Pr. 254.

10 Hastings v. Drew, 50 How. Pr. 254; aff'd in Ct. App. 8 W. Dig. 488.

11 McCoy v. Farmer, 65 Mo. 244.

12 Re Independent Ins. Co. 1 Holmes, 103.

13 Owen v. Smith, 31 Barb. 641; Brooklyn Park Comm'rs v. Armstrong, 45 N. Y. 243; 3 Lans. 429; Haldeman v. Penn'a R. R. Co. 50 Pa. St. 433; Dingley v. City of Boston, 100 Mass. 544; DeValaigne v. Fox, 2 Blatchf. 95; Heath v. Barmore, 50 N. Y. 302. But see Acklin v. Paschal, 48 Tex. 147, as to reverter of land devised to a corporation. See also People v. College of California, 33 Cal. 166.

14 McGoon v. Scales, 9 Wall. 23.

§ 208. **Effect upon pending suits.**—It is the general rule, that suits pending for or against a corporation abate upon its dissolution.¹ But this rule is frequently modified by the charter or by statute.² And where a corporation is consolidated with others, and its name changed, pending a suit against it, this is not such a dissolution of the corporation that the suit abates.³ And a corporation may be restrained from taking steps to procure its dissolution in a state court, pending a suit against it in the federal courts.⁴ A transfer by a corporation of its property and franchise, in pursuance of its charter, is not such a dissolution of the corporation as will disable it from suing for the purchase-money.⁵ The dissolution of a corporation by an act of the legislature deprives it of its corporate existence,⁶ and no legal judgment can be rendered against it subsequent to that time.⁷ So, if a corporation becomes extinct after a judgment in its favor, no execution can issue regularly in the corporate name, and if one be sued out, it may be quashed.⁸

1 *Carey v. Giles*, 10 Ga. 9; *Bank of Louisiana v. Wilson*, 19 La. 1; *National Bank v. Colby*, 21 Wall. 609; *Building Assoc. v. Anderson*, 7 Phila. 106; *McCullough v. Norwood*, 58 N. Y. 522; 4 *Jones & S.* 180. Compare *Hunt v. Columbian Ins. Co.* 55 Me. 290; *Lindell v. Benton*, 6 Mo. 361; *Bank of Alexandria v. Patton*, 1 Rob. (Va.) 499; *Toledo etc. Railw. Co. v. Beggs*, 85 Ill. 80.

2 See *McCullough v. Norwood*, 58 N. Y. 522; 4 *Jones & S.* 180; *Tuscaloosa etc. Assoc. v. Green*, 49 Ala. 346; *Ramsey v. Peoria etc. Ins. Co.* 55 Ill. 311; *Re International Pulp etc. Co.* Law R. 3 Ch. Div. 524; *Re Lloyd etc. Co.* Law R. 6 Ch. Div. 339.

3 *East Tenn. etc. R. R. Co. v. Evans*, 6 Helsk. 607; *Baltimore etc. R. R. Co. 2 Grant Cas.* 348; and compare *Booth v. Bunce*, 33 N. Y. 132. Nor does consolidation impair the existence of either corporation for the purpose of prosecuting suits previously commenced; *Shackleford v. Miss. etc. R. R. Co.* 2 Miss. 153.

4 *Fisk v. Union Pacif. R. R. Co.* 10 Blatchf. 518.

5 *Saugatuck Bridge Co. v. Westport*, 39 Conn. 337.

6 See § 198, *ante*.

7 *Merrill v. Suffolk Bank*, 31 Me. 57; and compare *Shamokin Valley etc. R. R. v. Malone*, 85 Pa. St. 25; *Thornton v. Marginal Freight Railw. Co.* 123 Mass. 32. *Re Dinson's Estate* *Fireclay Co.* Law R. 19 Eq. 202.

8 *May v. State Bank of No. Car.* 2 Rob. (Va.) 56.

§ 209. **Effect upon contracts.**—The existence of the private contracts of a corporation does not force upon

it a perpetuity of existence.¹ Parties must be presumed to understand the nature and incidents of such a body politic, and to contract with reference to them.² A dissolution, as a general rule, operates to rescind all existing contracts entered into by or with the corporation,³ and no further rights can be acquired by or against it.⁴ But parties affected by the rescission of contracts consequent to dissolution are entitled to damages for the breach, and may enforce them against the assets.⁵ And nothing short of actual dissolution will justify the non-fulfillment by a party of a contract made with a corporation.⁶ Subscriptions to the capital stock of a corporation, remaining unpaid at the time of dissolution, are the property of the corporation, which may be reached by creditors through the aid of a court of equity.⁷ Where a corporation changes its name for convenience, but continues the same general business with the same officers, it is responsible under the new name for all its previous debts.⁸ But where persons interested in a trading company form a new corporation, which assumes the liabilities of the old one, the new corporation is not bound to perform a contract made by the old one to transfer shares of its stock, by transferring an equal number of shares in the new company;⁹ nor can it be in any event held liable for damages for the breach of such contract in the value of an equal number of shares of its own stock.¹⁰

1 *Mumma v. Potomac Co.* 8 Peters, 281.

2 *Mumma v. Potomac Co.* 8 Peters, 281; and see *Welch v. Str. Genevieve*, 1 Dill. 130; *Bacon v. Robertson*, 18 How. 480; *Butterworth v. O'Brien*, 24 How. Pr. 438.

3 See *Chapman's Case*, Law R. 1 Eq. 346; *Reg. v. Poor Law Board*, Law R. 5 Q. B. 785; *Mallory v. Mallett*, 6 Jones' Eq. 345.

4 *White v. Campbell*, 5 Humph. 38; *Carrington v. Commercial etc. Ins. Co.* 1 Bosw. 152; *Green v. Seymour*, 3 Sand. Ch. 235; *Saltmarsh v. Planters' etc. Bank*, 17 Ala. 761.

5 *Shirreff's Case*, Law R. 14 Eq. 417; *Ex parte Cope*, 1 Eng. L. & Eq. 87; *Reg. v. Local Government Board*, Law R. 9 Q. B. 148; and see *Nevitt v. Bank of Port Gibson*, 6 Smedes & M. 522; *New Albany v. Barke*, 11 Wall. 96; *Muscantine v. Railroad Co.* 1 Dill. 536; *West. Sav. Bank v. Philadelphia*, 31 Pa. St. 175; *Coulter v. Robertson*, 24 Miss. 278; *Carey v. Cin. etc. R. R. Co.* 5 Clarke, 367.

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6 *Re Phoenix Bessemer Steel Co.* Law R. 4 Ch. Div. 108. And compare *McGoon v. Scales*, 9 Wall. 23; *Mumma v. Potomac Co.* 8 Peters, 231.

7 *Schaeffer v. Mo. etc. Ins. Co.* 46 Mo. 248; *Hightower v. Thornton*, 3 Ga. 446; *Bassett v. St. Albans etc. Co.* 47 Vt. 313; and see *Currier v. Lebanon State Co.* 84 N. H. 262; *Sawyer v. Hoag*, 17 Wall. 610.

8 *Dean v. La Motte Lead Co.* 59 Mo. 523. Compare *Stewart's Appeal*, 72 Pa. St. 211; *St. Louis etc. R. R. Co. v. Miller*, 43 Ill. 190; *Montgomery etc. R. R. Co. v. Boring*, 61 Ga. 582.

9 *Conant v. National Ice Co.* 8 Jones & S. 83.

10 *Conant v. National Ice Co.* 8 Jones & S. 83. Compare *Miller v. National Steamship Co.* 67 Barb. 285; *Smith v. Chicago etc. Railw. Co.* 18 Wis. 17; *Paxton v. Bacon Mill etc. Mfg. Co.* 2 Nev. 257; *Johnson v. Trustees etc.* 2 Cal. 319; *Low v. Conn. etc. R. R.* 48 N. H. 284.

§ 210. Rights of creditors, stockholders, etc.—

On the dissolution of a corporation, its effects are a trust fund for the payment of its creditors;¹ and a state law, which deprives creditors of this right, and appropriates the property to other uses, impairs the obligation of their contracts, and is invalid.² If there are several creditors, and the fund is insufficient to discharge all the debts, it should be distributed ratably.³ Creditors have a right of priority of payment, in preference to the stockholders.⁴ And a surety for the corporation, who pays money as such surety, is only entitled to come in ratably with the other creditors.⁵ The interests of the several stockholders become equitable rights to proportionate shares of the corporate property after payment of the debts;⁶ and in making distribution, each stockholder is to be charged with the debts due from him to the corporation.⁷ Stockholders, whose subscriptions are fully paid, have a right to a return of the excess paid by them above the others, who have paid but in part, before any division of the balance is made.⁸ Officers of an insolvent corporation are not entitled to payment of their salaries in full, in preference to the debts of other creditors, but must come in with the latter for their ratable proportion of the assets;⁹ but if one of them is indebted to the corporation, he can have his salary set off against that debt.¹⁰ A debt due a shareholder from the company, and assigned by him after the commencement of "winding-up" proceedings, is sub-

ject to a right of set-off by the company of all calls made subsequently to the assignment, and previously to the payment of the debt.¹¹ In proceedings in equity to dissolve a joint-stock company, all its members need not necessarily be made parties;¹² it is enough if the parties before the court are sufficient to authorize it to adjudicate upon the company's rights.¹³

1 *Hightower v. Thornton*, 8 Ga. 496; and see §§ 206, 207, *ante*; *Butterworth v. O'Brien*, 24 How. Pr. 438.

2 *Curtan v. State*, 15 How. 304; and see *Gillett v. Moody*, 3 N. Y. 479.

3 *Briggs v. Penniman*, 8 Cowen, 387. See *Booth v. Bunce*, 24 N. Y. 292; *Matter of Waterbury*, 8 Paige, 380; *Re Accidental etc. Ins. Corp. Law R. 5 Ch. 428*.

4 *Hastings v. Drew*, 50 How. Pr. 254. Compare *Frothingham v. Barney*, 6 Hun, 366; *Matter of Woven Tape Shirt Co.* 8 id. 508; *State v. Bank of the State*, 1 So. Car. 63.

5 *Matter of Croton Ins. Co.* 2 Barb. Ch. 360.

6 *James v. Woodruff*, 10 Paige, 541.

7 *James v. Woodruff*, 10 Paige, 541.

8 *Krebs v. Carlisle Bank*, 2 Wall. C. C. 33.

9 *Matter of Croton Ins. Co.* 3 Barb. Ch. 642. Compare *Re English Joint Stock Bank*, Law R. 4 Eq. 350; *Re London etc. Bank*, Law R. 9 Eq. 149; *Bruyn v. Receiver etc.* 9 Cowen, 413 n.

10 *Matter of Croton Ins. Co.* 3 Barb. Ch. 642. Compare *Re Imperial Wine Co.* Law R. 14 Eq. 417.

11 *Re China Steamship Co.* Law R. 7 Eq. 240; and compare *Re Duckworth*, Law R. 2 Ch. 578; *Re Overend*, Law R. 1 Ch. 523.

12 *Von Schmidt v. Huntington*, 1 Cal. 55.

13 *Von Schmidt v. Huntington*, 1 Cal. 55.

§ 211. Revival of corporation.—In England, the king may revive a corporation after it has been dissolved,¹ or he may create a new one in place of the old.² If the old corporation be revived, its original rights and capacities are revived with it;³ but if a new corporation be created, it neither possesses the rights, nor can it be subjected to the liabilities, of the old.⁴ In this country, a corporation may be revived after the expiration of its charter, by a subsequent statute;⁵ but whether the statute merely revives the old corporation or creates a new one, will depend upon its terms, construed consistently with the legislative intent and the intent of the corporators.⁶

1 *Rex v. Pasmore*, 3 Term Rep. 199; *Newling v. Francis*, id. 169; *Colchester v. Seaber*, 3 Burr. 1866; *Mayor etc. v. Brooke*, 7 Q. B. 339.

2 *Rex v. Amery*, 2 Term Rep. 569; *Colchester v. Seaber*, 3 Burr. 1866; and see *President etc. v. Moore*, 13 Sumner & M. 157.

3 *Rex v. Pasmore*, 3 Term Rep. 241.

4 *Colchester v. Seaber*, 3 Burr. 1866; and see *Mayor etc. v. Brooke*, 7 Q. B. 339; *Union Canal Co. v. Young*, 1 Whart. 410.

5 See *Frankfort Bank v. Johnson*, 23 Me. 322; *Exeter Bank v. Rogers*, 7 N. H. 21; *Lea v. American etc. Canal Co.* 3 Abb. Fr. N. S. 1; *Kinchald v. Dwinelle*, 60 N. Y. 543; *State Bank v. State*, 1 Blackf. 267.

6 *Bellows v. Hallowell Bank*, 3 Mason, 43; *People v. Marshall*, 1 Gilm. 672; *Coulding v. Clarke*, 34 N. H. 143.

CHAPTER XVIII.

BANKS.

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§ 212. Definitions.—The principal attributes of a bank are, the right to issue negotiable notes, discount notes, and receive deposits.¹ In the commercial sense, banks are of three kinds: of deposit, of discount, and of circulation.² And an institution which exercises only one of these functions may be a bank in the strictest commercial sense.³ Thus, an institution for receiving savings is "a bank or company engaged in the business of banking," within the purview of the internal revenue

laws.⁴ Within the meaning of acts of Congress,⁵ having a place of business where deposits are received and paid out on checks, and where money is loaned upon security, is the substance of the business of a banker.⁶ A banker is a dealer in capital—an intermediate party between the borrower and lender.⁷ He borrows of one party, and lends to another, and the difference between the terms at which he borrows and lends is the source and measure of his profits.⁸ The words “any other bank,” used in a bank charter, have reference only to incorporated banks.⁹ The issue of a certificate of deposit by a safe-deposit company is held not to be the exercise of banking powers.¹⁰ Banks are among the earliest chartered institutions.¹¹

1 People v. Utica Ins. Co. 15 Johns. 356; New York etc. Ins. Co. v. Ely, 2 Cowen, 618; and see Ohio etc. Trust Co. v. Dubolt, 16 How. 416; People v. River Raisin etc. R. R. Co. 12 Mich. 339; U. S. Trust Co. v. Brady, 20 Barb. 119; Pattison v. Syracuse Nat. Bank, 80 N. Y. 82; Phila. Loan Co. v. Towner, 13 Conn. 249.

2 Bank for Savings v. Collector, 3 Wall. 495.

3 Oulton v. Sav. Inst. 17 Wall. 109.

4 Bank for Savings v. Collector, 3 Wall. 495. See State v. Louisiana Sav. Co. 13 La. An. 568.

5 13 Stat. at Large, 252, 472.

6 Warren v. Shook, 91 U. S. 704.

7 1 McCull. Com. Dict. 86.

8 1 McCull. Com. Dict. 86-117; Curtis v. Leavitt, 15 N. Y. 9, 167.

9 Campbell v. Farmers' Bank, 10 Bush, 182. Compare *Re Leavenworth Sav. Bank*, 14 Bank. Reg. 92.

10 Pardee v. Fish, 60 N. Y. 265.

11 See Bank of England v. Anderson, 3 Bing. N. C. 589.

§ 213. Right to exercise banking powers.—At common law, the right of banking belongs to individual citizens,¹ and may be exercised by them at their pleasure until forbidden by legislative enactment.² But the sovereign authority may regulate and restrain this right,³ and the business of banking may, by legislation, be made a corporate franchise.⁴ When laws upon the subject have been duly enacted, the business must be commenced and carried on strictly in accordance therewith.⁵ Generally, banks are of statutory creation, and are corporations.⁶ They may exist, either under a charter,⁷ or a general

organic law.⁶ But banking powers to be exercised by corporations must be expressly granted;⁹ and a charter which contains no allusion to banking powers does not confer them by implication from the fact that it creates a corporation with a money capital.¹⁰ But no particular form of expression is necessary to authorize banking operations.¹¹ It is sufficient if the attributes of banking are conferred.¹² Congress has power to incorporate a bank whenever such an institution is deemed the most appropriate means of carrying into effect any of the enumerated powers of the general government.¹³ The nature of the business of bankers in England is declared to be a part of the law-merchant, of which the courts will take judicial notice.¹⁴ And it has sometimes been held in this country that statutes establishing banks are public laws, and to be judicially noticed by the courts.¹⁵ A statute referring to a bank by name may be deemed a legislative recognition of its corporate existence.¹⁶

1 Bank of Augusta v. Earle, 13 Peters, 519, 596. Compare Anderson v. Alexander, 7 Am. Law Reg. 173.

2 Nance v. Hemphill, 1 Ala. 551.

3 Bank of Augusta v. Earle, 13 Peters, 516.

4 Att.-Gen. v. Utica Ins. Co. 2 Johns. Ch. 371; State v. Williams, 8 Tex. 253; Curtis v. Leavitt, 15 N. Y. 9, 52; Workingmen's Accommodation Bank v. Converse, 29 La. An. 369.

5 People v. Bartow, 6 Cowen, 290; Curtis v. Leavitt, 15 N. Y. 9.

6 See State v. Helmes, 2 Pen. (N. J.) 764; Anderson v. Alexander, 7 Am. Law Reg. 173; Barnes v. Ontario Bank, 19 N. Y. 152; Metrop. Bank v. Godfrey, 23 Ill. 579. Compare Codd v. Rathbone, 19 N. Y. 37.

7 See Commonw. v. U. S. Bank, 2 Ashm. 349; Woodfork v. Union Bank, 3 Cold. 438; Payne v. Baldwin, 3 Smedes & M. 661; Farrington v. Tennessee, 95 U. S. 679; State v. Accommodation Bank, 28 La. An. 288.

8 See Robinson v. Bank of Attica, 21 N. Y. 406; White v. Row, 3 McLean, 111; State v. Lehre, 7 Rich. 234; Curtis v. Leavitt, 15 N. Y. 9, 78; Bank of the State v. Smith, 33 Mo. 364.

9 State v. Washington etc. Library Co. 11 Ohio, 96.

10 State v. Stebbins, 1 Stewt. 299; and see Blair v. Perpetual Ins. Co. 10 Mo. 554; State v. Alexandrian Soc. 11 Ohio, 1.

11 People v. Utica Ins. Co. 15 Johns. 358, 355.

12 People v. Utica Ins. Co. 15 Johns. 353.

13 Osborn v. Bank of U. S. 9 Wheat. 733; McCullough v. State, 4 Id. 316; and compare First Nat. Bank v. Lamb, 50 N. Y. 35; Veazie Bank v. Fenno, 8 Wall. 533.

14 *Bank of Australasia v. Breillat*, 6 Moore P. C. C. 173; *Brandao v. Barnett*, 12 Clark & F. 787.

15 See *Hays v. North-western Bank*, 9 Gratt. 127; *Williams v. Union Bank*, 2 Blumh. 339; *Bank of Tenn. v. Woodson*, 5 Cold. 176; *Towson v. Havro de Grace Bank*, 6 Har. & J. 47; *Bank of Utica v. Magher*, 18 Johns. 341. But see *Agnew v. Bank of Gettysburg*, 2 Har. & G. 478; *King v. Doolittle*, 1 Head, 77.

16 *State v. Helmes*, 2 Pen. (N. J.) 764.

§ 214. Powers.—Banks possess such powers as are expressly given them by charter, or by the statute under which they are operating, and such implied powers as are necessary to the proper exercise of those expressly given.¹ They have implied power to borrow money, when necessary, in the prosecution of their business,² and may issue the ordinary evidences of debt.³ So, they may take and hold stock and bonds as collateral security,⁴ but not to traffic in them, for profit.⁵ Nor does the power to purchase and traffic in promissory notes, as a species of personal property, belong to any bank as a necessary incident to its existence, or to the exercise of any of its powers as a bank of circulation and deposit alone.⁶ But a power "to deal in bills of exchange" includes authority to take bills of exchange for collection merely, and does not restrict the bank to buying and selling bills.⁷ A bank may deal in checks, whether payable to bearer or to order;⁸ or may appoint an agent to transact any business which it may lawfully do;⁹ or it may transfer by an indorsement, or by a delivery under a blank indorsement, a negotiable note;¹⁰ and, generally, its right to sell any of its property, in the absence of restrictions to the contrary, is as unlimited as that of an individual, if not carried into the transaction of another separate and unauthorized branch of the business.¹¹ And, as a general rule, a bank is bound by the same obligations, moral and legal, when the rights of third parties are concerned, that apply to the case of an individual, unless expressly exempted therefrom.¹² Thus, a bank is no more exempt than an individual from the operation of the usury laws,¹³ except that in the case of a mercantile discount, it may

receive the amount of interest in advance.¹⁴ Discounting or loaning money, with a deduction of the interest in advance,¹⁵ is a part of the general business of banking,¹⁶ and may be done even without specific authority conferred by the charter.¹⁷

1 Barnes v. Ontario Bank, 19 N. Y. 152; Weckler v. First Nat. Bank, 42 Md. 561; Duncau v. Maryland Sav. Inst. 10 Gill & J. 239; Bliss v. Anderson, 31 Ala. 612; State v. Alexandrian Soc. 11 Ohio, 1; Hughes v. Bank of Somerset, 5 Litt. 45.

2 Curtis v. Leavitt, 15 N. Y. 9, 53; Talman v. Rochester City Bank, 18 Barb. 123; Union Min. Co. v. Rocky Mt. Nat. Bank, 2 Cold. 248. See also Kent v. Quicksilver Min. Co. 78 N. Y. 159, 176; and it seems that a bank may buy real estate for banking purposes alone: Metrop. Bank v. Godfrey 24 Ill. 579. Compare White v. Lester, 4 Abb. Ct. App. 585.

3 Magee v. Nokelunne etc. Co. 5 Cal. 258; Barnes v. Ontario Bank, 19 N. Y. 152; Rockwell v. Elkhorn Bank, 13 Wis. 653.

4 Dearbourn v. Union Nat. Bank, 58 Me. 273; Third Nat. Bank v. Boyd, 44 Md. 47; Scott v. Crews, 2 So. Car. 522; Trenton Banking Co. v. Woodruff, 1 Green Ch. 117.

5 Fleckner v. Bank of U. S. 8 Wheat. 338; Sackett's Harbor Bank v. Lewis County Bank, 11 Barb. 213; Portland Bank v. Storer, 7 Mass. 433; First Nat. Bank v. Nat. Ex. Bank, 39 Md. 600. Compare Van Leuven v. First Nat. Bank, 54 N. Y. 671.

6 Farmers' etc. Bank v. Baldwin, 23 Minn. 196; and see McLean v. Lafayette Bank, 3 McLean, 587; Dunkle v. Reunick, 6 Ohio St. 534; First Nat. Bank v. Pierson, 24 Minn. 140; 31 Am. R. 341.

7 Bank at Montgomery v. Knox, 1 Ala. 148.

8 First Nat. Bank v. Harris, 108 Mass. 514.

9 Bates v. State Bank, 2 Ala. 451; Planters' etc. Bank v. Andrews, 17 Id. 404. Compare City Bank v. Beach, 1 Blatchf. 425; Bank of Augusta v. Earle, 13 Pet. 519.

10 Cooper v. Curtis, 30 Me. 488; White's Bank v. Toledo Ins. Co. 12 Ohio St. 60; Marvin v. Hymers, 12 N. Y. 223, 233.

11 Planters Bank v. Sharp, 6 How. 301.

12 Lowry v. Commercial etc. Bank, Taney, 312.

13 Maine Bank v. Butts, 9 Mass. 49; Bates v. State Bank, 2 Ala. 451; Rimontou v. Lanier, 71 No. Car. 4-8; Darby v. Boatmen's Sav. Inst. 1 Dill. 141; Chafin v. Lincoln Sav. Bank, 7 Helsk. 489.

14 Bank of Alexandria v. Mandeville, 1 Cranch C. C. 552; Creed v. Commercial Bank, 11 Ohio, 489.

15 State v. Boatmen's Sav. Inst. 48 Mo. 189.

16 See Bank of Savings v. Collector, 3 Wall. 496.

17 Fleckner v. Bank of U. S. 8 Wheat. 338.

§ 215. Directors.—A board of bank directors is a body recognized by the law.¹ They have the general superintendence and active management of all the concerns of the bank, and constitute, to all purposes of dealing with others, the corporation.² They are chargeable with

a duty to use ordinary diligence in acquiring knowledge of the business of the bank;³ and should control subordinate officers of the bank in all important transactions.⁴ They may delegate to a committee of their own number authority to mortgage the real estate of the bank to secure a debt;⁵ and they have power to authorize the president alone, or the president and cashier, to borrow money, or to obtain discounts for the use of the bank.⁶ But the power to make discounts and fix any conditions which may be proper in loaning money, rests alone and exclusively in the directors,⁷ and they cannot delegate the power to others.⁸ Directors have authority to use the funds and property of the bank only for proper banking purposes.⁹ Without authority from the stockholders, they can make no gifts from the corporate property, nor appropriate the funds of the bank to any objects foreign to the material well-being of the bank.¹⁰ In reference to the corporate property, they act in the relation of trustees;¹¹ and are within the rule which governs the dealings of trustee and *cestui que trust*.¹² It is implied in the acceptance of the trust, that they will use their best efforts to promote the interests of the stockholders,¹³ and that they will in no way use their positions to advance their individual interest as distinguished from that of the bank,¹⁴ or acquire interests in conflict with the fair and proper discharge of their duty.¹⁵ For losses arising from misconduct in managing the affairs of the bank they are liable;¹⁶ but it is otherwise in respect of losses arising from excusable mistakes, or from errors strictly of discretion.¹⁷ Notice to the board of directors of a bank is notice to the bank.¹⁸ And notice to one or more of the directors, when engaged in the business of the bank, will be deemed notice to the bank.¹⁹ Thus, if a director acts for the bank in discounting a note, known to him to be infected with

- fraud or illegality in its inception, the bank is affected with his knowledge.²⁰ A director is affected with notice of the condition and transactions of the bank, of its pow-

ers, and of its legal rights;²¹ and if he has borrowed money from it, he cannot be heard to defend an action by the bank for its recovery, on the ground that the loan was *ultra vires* and illegal.²²

- 1 Burrill v. Nahant Bank, 2 Met. 163.
- 2 Burrill v. Nahant Bank, 2 Met. 163; and see McDougald v. Belamy, 18 Ga. 411; Bank of Tenn. v. Woodson, 5 Cold. 178.
- 3 Merchants' Bank v. Rudolf, 5 Neb. 527; Lyman v. U. S. Bank, 1 Blatchf. 297; 12 How. 225; Gillet v. Phillips, 13 N. Y. 114; Curtis v. Leavitt, 15 id. 9.
- 4 United Society etc. v. Underwood, 9 Bush, 609.
- 5 Burrill v. Nahant Bank, 2 Met. 163.
- 6 Ridgway v. Farmers' Bank, 13 Serg. & R. 256. See also Fleckner v. Bank of U. S. 3 Wheat. 338; Merrick v. Bank of Metropolis, 8 Gill, 59.
- 7 Lyon v. Jerome, 26 Wend. 485; Percy v. Millandon, 3 La. 568; Bank Comm'rs v. Bank of Buffalo, 6 Paige, 497; Bank of U. S. v. Dunn, 6 Peters, 51.
- 8 Lyon v. Jerome, 26 Wend. 485.
- 9 Frankfort Bank v. Johnson, 24 Me. 490; Bank of Australasia v. Breillat, 6 Moore P. C. C. 197; Pickering v. Stephenson, Law R. 14 Eq. 322.
- 10 Frankfort Bank v. Johnson, 24 Me. 490; and see Bedford R. R. Co. v. Bowser, 48 Pa. St. 29.
- 11 Baird v. Bank of Washington, 11 Serg. & R. 411; Butts v. Wood, 38 Barb. 181; and see Hale v. Republican River Bridge Co. 8 Kan. 466; Ex parte Robinson, 2 DeGex M. & G. 517; Ex parte Bennett, 15 Beav. 238.
- 12 See Cumberland etc. Coal Co. v. Parish, 42 Md. 598; Comm'rs etc. v. Reynolds, 44 Ind. 509; Richards v. New Hamp. Ins. Co. 43 N. H. 263.
- 13 Cumberland etc. Coal Co. v. Parish, 42 Md. 598.
- 14 Baird v. Bank of Washington, 11 Serg. & R. 411.
- 15 See European etc. Railw. Co. v. Poor, 59 Me. 277; Conynham's App. 57 Pa. St. 474; Bradley v. Farwell, 1 Holmes, 433.
- 16 Bank of St. Marys v. St. John, 25 Ala. 586; Conant v. Seneca County Bank, 1 Ohio St. 298; Gunkle's App. 48 Pa. St. 13.
- 17 Sperring's App. 71 Pa. St. 11; Godbold v. Branch Bank, 11 Ala. 191. Compare Robinson v. Chartered Bank, Law R. 1 Eq. 32.
- 18 Mechanics' Bank v. Seton, 1 Peters, 299; Fulton Bank v. N. Y. etc. Canal Co. 4 Paige, 127; and see Toll Bridge Co. v. Betsworth, 30 Conn. 290; Olcott v. Tioga R. R. Co. 27 N. Y. 546, 564.
- 19 Bank of Pittsburg v. Whitehead, 10 Watts, 397; Wash. Bank v. Lewis, 23 Pick. 24; National Bank v. Norton, 1 Hill, 572; In re Carew, 31 Beav. 39. Compare Gould v. Cayuga Co. Nat. Bank, 56 How. Pr. 506.
- 20 Nat. Security Bank v. Cushman, 121 Mass. 490.
- 21 Lyman v. U. S. Bank, 1 Blatchf. 297; 12 How. 225; United Soc. v. Underwood, 9 Bush, 609.
- 22 Lester v. Howard Bank, 33 Md. 558; and see Merchants' Bank v. Rudolf, 5 Neb. 527.

§ 216. President.—The president of a bank is usually chosen by the board of directors from their own number;

and it is his duty to preside at meetings of the board.¹ By virtue of his office he has a right to take charge of the litigation of the bank,² and may appear and answer for it, and employ counsel for its defense;³ but beyond this the authority inherent in the office itself is very limited.⁴ If, however, he is in the habit of acting as the business agent of the bank, with its knowledge and without objection, actual authority may be inferred, and the bank will be bound by his act.⁵ Admissions made by him relative to matters within the scope of his agency bind the bank.⁶ Thus, he has general authority to receive a deposit, and issue a certificate; and the bank is bound by statements and representations made by him when transacting the business.⁷ As a general rule, in the absence of a provision for compensation either by contract or by a vote of the directors, it is presumed that the services of the president are gratuitous.⁸

1 See *Crawford v. Branch Bank*, 7 Ala. 205; *Currie v. Mut. Ins. Co.* 4 Hen. & M. 315.

2 *Savings Bank v. Benton*, 2 Met. (Ky.) 240; and see *Delafield v. Kinney*, 24 Wend. 345; *Ogdensburgh Bank v. Van Rensselaer*, 6 Hill, 240.

3 *Am. Ins. Co. v. Oakley*, 9 Paige, 496; *Alexandria Canal Co. v. Swann*, 5 How. 53; *Oakley v. Workmen's etc. Ben. Soc.* 2 Hilt. 487.

4 See *Farmers' Bank v. McKee*, 2 Pa. St. 318; *Olney v. Chadsey*, 7 R. I. 234; *Spyker v. Spence*, 8 Ala. 343; *Austin v. Daniels*, 4 Demo. 229; *First Nat. Bank v. Bennett*, 33 Mich. 520; *Hodge v. Nat. Bank*, 22 Gratt. 51; *Booth v. Farmers' etc. Bank*, 4 Laus. 301; *Sterling v. Marietta etc. Trading Co.* 11 Serg. & R. 179.

5 *Fremont Bank v. Panic*, 28 Vt. 24; *Parker v. Donally*, 4 W. Va. 648; *Neiffer v. Bank of Knoxville*, 1 Head, 162; and see *Farmers' etc. Trust Co. v. Mann*, 4 Robt. 356; *Chicago etc. R. R. Co. v. Coleman*, 18 Ill. 297; *Dougherty v. Hunter*, 54 Pa. St. 380; *New Orleans Build. Co. v. Lawson*, 11 La. 34.

6 *Spalding v. Bank of Susquehanna Co.* 9 Pa. St. 28. Compare *Lime Rock Bank v. Hewett*, 52 Me. 531; *Mackay v. Commercial Bank*, Law R. 5 Com. P. 394.

7 *Hazleton v. Union Bank*, 32 Wis. 34. Compare *Fulton Bank v. N. Y. etc. Canal Co.* 4 Paige, 127.

8 *Holland v. Lewiston Falls Bank*, 52 Me. 564; *Sawyer v. Pawner's Bank*, 6 Allen, 207.

§ 217. **Cashier, his powers and duties.**—The cashier is the executive officer of the bank to manage its concerns in all things not peculiarly committed to the direct-

ors;¹ and, as such officer, he transacts most of the business of the bank.² Whatever is done by him in that capacity, within the scope of his duties, is the act of the bank.³ His ordinary duties are to keep the funds, notes, bills, and other choses in action of the bank to be used as the exigencies of the bank may demand;⁴ to receive all moneys and notes of the bank; to surrender notes and other securities when paid; to draw checks; to withdraw funds of the bank on deposit, and generally to transact the ordinary routine of business.⁵ He is the officer through whom the whole financial operations of the bank are conducted;⁶ and his acts, within the general usage, practice, and course of business conducted by the bank, will bind it in favor of third persons possessing no other knowledge.⁷ If there is any special restriction upon his general authority to act, the bank must show it.⁸ *Prima facie* he must be deemed to have authority to transfer and indorse negotiable securities held by the bank for its use;⁹ but he cannot transfer non-negotiable paper without authority from the bank;¹⁰ and he cannot, without special authority, bind his bank by an official indorsement of his individual note;¹¹ nor release a surety upon a note held by the bank;¹² nor bind the bank to indemnify an officer for levying upon property on an execution in favor of the bank;¹³ nor execute a mortgage on the real estate of the bank;¹⁴ nor certify post-dated checks;¹⁵ nor pledge the assets of the bank for the payment of an antecedent debt;¹⁶ and it is not within the scope of the powers ordinarily conferred upon a cashier to appear and defend suits against the bank;¹⁷ nor has he by virtue of his office any authority in another state to settle an account, taking private notes and drafts, and giving a receipt in full.¹⁸ He may, however, in virtue of his general employment, borrow money on behalf of the bank,¹⁹ and bind it by a promissory note executed therefor.²⁰ And he has authority to take such measures for the security and eventual collection of a debt as he deems prop-

er;²¹ and may act in reference to it, by way of compromise, according to the general usage, practice, and course of business.²² The cashier is the proper officer to make or superintend the transfer of shares;²³ to take charge of the correspondence of the bank;²⁴ to accept or refuse the account of those who wish to become depositors;²⁵ and the subordinates of the bank act under his direction.²⁶ His admissions and declarations in relation to matters within the scope of his ordinary duties are binding upon the bank;²⁷ and if the directors suffer him to pursue a particular line of conduct for a considerable period, without objection, the bank will be bound by his acts.²⁸ If the cashier receive securities for safe-keeping, and the deposit is known to the directors and acquiesced in, the bank will be liable.²⁹ If the cashier fails to exercise reasonable skill and ordinary care and diligence in the discharge of his duties, and the bank suffers damage thereby, he is liable;³⁰ and much more so, if he caused the damage by any illegal, fraudulent, or tortious act;³¹ and specific statutory penalties are sometimes affixed to specific acts of wrong-doing.³²

1 *Minor v. Mechanics' etc. Bank*, 1 Peters, 46; *Bridenbecker v. Lowell*, 32 Barb. 9, 17; *Bissell v. First Nat. Bank*, 69 Pa. St. 415; *Badger v. Bank of Cumberland*, 26 Me. 423. Compare *Brown v. Adams*, 5 Blas. 181.

2 *United States v. City Bank*, 21 How. 356; *Baldwin v. Bank of Newbury*, 1 Wall. 234.

3 *Bank of Ky. v. Schuykill Bank*, Pars. Sel. Cas. 190; *State v. Commercial Bank*, 6 Smedes & M. 218; *Burnham v. Webster*, 19 Me. 221. See *Brown v. Adams*, 5 Blas. 181.

4 *Frankland Bank v. Steward*, 37 Me. 519; *Wild v. Bank of Passamaquoddy*, 3 Mas. (C. C.) 505; *State Bank v. Wheeler*, 21 Ind. 96.

5 *United States v. City Bank*, 21 How. 356; *Kimball v. Cleveland*, 4 Mich. 606; *Sturges v. Bank of Circleville*, 11 Ohio St. 153; *Morse v. Mass. Nat. Bank*, 1 Holmes, (C. C.) 209.

6 *Merchants' Bank v. State Bank*, 10 Wall. 604, 650; *Wakefield Bank v. Truesdell*, 55 Barb. 602; *Caldwell v. Mohawk etc. Bank*, 64 id. 333.

7 *Lloyd v. West Branch Bank*, 15 Pa. St. 172; *Matthews v. Mass. Nat. Bank*, 1 Holmes, 336; *Commercial Bank v. Kortright*, 22 Wend. 248.

8 *State v. Commercial Bank*, 6 Smedes & M. 218; and see *Bank of Penn'a v. Reed*, 1 Watts & S. 101; *Baldwin v. Bank of Newbury*, 1 Wall. 234.

9 *Ryan v. Dunlap*, 17 Ill. 40; *Pratt v. Topeka Bank*, 12 Kans. 576; *Ridgway v. Farmers' Bank*, 12 Serg. & R. 265; *Fleckner v. Bank of U.*

S. & Wheat, 336; *State Bank v. Wheeler*, 21 Ind. 80; *Robb v. Ross County Bank*, 41 Barb. 586; and see *Folger v. Chase*, 18 Pick. 63; *State Bank v. Fox*, 3 Blatchf. 431; *Haughton v. First Nat. Bank*, 26 Wis. 663; *Elwell v. Dodge*, 33 Barb. 336; *Bissell v. First Nat. Bank*, 69 Pa. St. 415, as to forms of indorsement.

- 10 *Holt v. Bacon*, 25 Miss. 567; *Barrick v. Austin*, 21 Barb. 241.
- 11 *West St. Louis Sav. Bank v. Shawnee County Bank*, 3 Dill. 403.
- 12 *Cocheo Nat. Bank v. Haskell*, 51 N. H. 116; *Merchants' Bank v. Rudolf*, 5 Neb. 517; and see *Hodge v. Nat. Bank*, 22 Gratt. 51.
- 13 *Watson v. Bennett*, 12 Barb. 196.
- 14 *Leggett v. N. J. etc. Banking Co.* 1 N. J. Eq. 441.
- 15 *Clarke Nat. Bank v. Bank of Albion*, 52 Barb. 592.
- 16 *Tennessee v. Davis*, 50 How. Pr. 447.
- 17 *Branch Bank v. Poe*, 1 Ala. 396.
- 18 *Sandy River Bank v. Merchants' etc. Bank*, 1 Blss. 146.
- 19 *Ballston Spa Bank v. Marine Bank*, 16 Wis. 120; *Sturges v. Bank of Circleville*, 11 Ohio St. 153.
- 20 *Barnes v. Ontario Bank*, 19 N. Y. 152.
- 21 *Eastman v. Coos Bank*, 1 N. H. 23; *Mitchell v. Cook*, 29 Barb. 243; *United States v. City Bank*, 21 How. 356; *Corser v. Paul*, 41 N. H. 24; *Hartford Bank v. Barry*, 17 Mass. 94.
- 22 *Bank of Penn'a v. Reed*, 1 Watts & S. 101; *Bridenbecker v. Lowell*, 32 Barb. 9; and see *Payne v. Commercial Bank*, 6 Smedes & M. 24.
- 23 *Commercial Bank v. Kortright*, 22 Wend. 348; *Smith v. Northampton Bank*, 4 Cush. 1.
- 24 *Branch Bank v. Steele*, 10 Ala. 915; *New Hope etc. Bridge Co. v. Phoenix Bank*, 3 N. Y. 156, 166.
- 25 *Thatcher v. Bank of State*, 5 Sand. 121.
- 26 *Merchants' Bank v. State Bank*, 10 Wall. 604.
- 27 *Sturges v. Bank of Circleville*, 11 Ohio St. 153; *Merchants' Bank v. Marine Bank*, 3 Gill, 96; *Haughton v. First Nat. Bank*, 26 Wis. 663. Compare *Salem Bank v. Gloucester Bank*, 17 Mass. 1; *Fendleton v. Bank of Ky.* 1 Mon. 171.
- 28 *City Bank v. Perkins*, 4 Bosw. 420; *Caldwell v. Mohawk etc. Bank*, 64 Barb. 313.
- 29 *First Nat. Bank v. Graham*, 79 Pa. St. 106; 100 U. S. 699.
- 30 *Austin v. Daniels*, 4 Denio, 299; *Commercial Bank v. Ten Eyck*, 48 N. Y. 345.
- 31 *Commercial Bank v. Ten Eyck*, 49 N. Y. 305; *Minor v. Mechanics' Bank*, 1 Peters, 46; *Bank of St. Mary's v. Calder*, 3 Strobl. 403.
- 32 See *State v. Stimson*, 4 Zab. 9.

§ 218. **Tellers.**—The office of a teller is to receive or pay out funds.¹ There are usually two—a paying teller and a receiving teller; the general duty of the former being to pay the moneys of the bank, and of the latter to receive money paid to or deposited in the bank.² And, as a general rule, neither can properly discharge the duty of the other.³ But where a debt due the bank was paid

to the paying teller, and there was proof of a usage in the bank when one officer was absent for another to act in his place, the bank was held to be bound by the payment.⁴ The receiving teller, in the discharge of his duty to receive money, has no right to receive anything but money, in the legal sense of the term.⁵ In order to render a bank liable for the negligence of a teller, there must be negligence such as enters into the cause of loss.⁶

1 See *Manhattan Co. v. Lydig*, 4 Johns. 377; *Terrell v. Branch Bank*, 12 Ala. 502.

2 *Farmers' etc. Bank v. Butchers' etc. Bank*, 16 N. Y. 125; *East River Nat. Bank v. Gove*, 57 id. 597.

3 *Thatcher v. Bank of State*, 5 Sand. 121.

4 *East River Nat. Bank v. Gove*, 57 N. Y. 597.

5 *Clark v. Metrop. Bank*, 3 Duer, 241. See *Wayne v. Com. Nat. Bank*, 22 Pa. St. 343; *Nat. Gold etc. Co. v. McDonald*, 51 Cal. 64.

6 *Scott v. Nat. Bank*, 72 Pa. St. 471.

§ 219. **Deposits.**—Deposits made with bankers are either general or special.¹ A deposit is deemed general, unless the depositor makes it special, or deposits it expressly in some particular capacity.² In cases of general deposits, which are peculiar to banking business, the depositor parts with the title to his money, and loans it to the banker;³ and the latter, in consideration of the loan, and the right to use the money for his own profit, agrees to refund the same amount, or any part thereof, on demand.⁴ The relation of banker and customer, as it respects general deposits, is that of debtor and creditor,⁵ and not that of trustee and *cestui que trust*.⁶ The deposit creates a debt, and the payment of the checks of the customer discharges such debt *pro tanto*.⁷ But in case of a special deposit, the bank merely becomes the bailee of the depositor, the title to the thing deposited remaining with the latter.⁸ And where a bank receives a special deposit, without compensation, it is bound only for slight care, and is responsible only for gross negligence.⁹ When a deposit is made in bank, the cashier usually gives a certificate to that effect, and from this may be learned the

nature of the deposit, whether it be general or special;¹⁰ that is, whether it be generally passed to the credit of the depositor, or specially lodged for safe-keeping merely.¹¹ A bank is not bound to receive on deposit the money and funds of every person who offers, but may arbitrarily select its customers from among those that apply.¹²

1 See *Marine Bank v. Fulton Bank*, 2 Wall. 252.

2 *Keene v. Collier*, 1 Met. (Ky.) 415; *Brahm v. Adkins*, 77 Ill. 263; and see *Bank of U. S. v. Macalester*, 9 Pa. St. 475.

3 *Bank of Republic v. Millard*, 10 Wall. 152; *Boyden v. Bank of Cape Fear*, 65 No. Car. 13; *Phelan v. Iron Mt. Bank*, 16 Bank. Reg. 303.

4 *Marine Bank v. Fulton Bank*, 2 Wall. 252; and see *Dawson v. Real Estate Bank*, 5 Ark. 283; *Coffin v. Anderson*, 4 Blackf. 355; *Pott v. Clegg*, 16 Mees. & W. 321.

5 *Knecht v. U. S. Sav. Inst.* 2 Mo. App. 563; *Bank of Republic v. Millard*, 10 Wall. 152; *Graves v. Dudley*, 20 N. Y. 76; *Bank of Northern Liberties v. Jones*, 42 Pa. St. 536; *Allen v. Fourth Nat. Bank*, 59 N. Y. 12; *Ætna Nat. Bank v. Fourth Nat. Bank*, 46 id. 82; 7 Am. R. 314; *Foley v. Hill*, 2 H. L. Cas. 39.

6 *Buchanan etc. Co. v. Woodman*, 1 Hun. 639; 4 *Thomp. & C.* 193; *Re Bank of Madison*, 5 Bliss. 515; *Crosskill v. Bower*, 32 Beav. 86; *Watts v. Christie*, 11 id. 546; *Bishop v. Countess of Jersey*, 2 Drew. 143.

7 *Albany Com. Bank v. Hughes*, 17 Wend. 94; *Foster v. Essex Bank*, 17 Mass. 473; *Oudle v. Nat. City Bank*, 45 N. Y. 735; 6 Am. R. 160; *Boyden v. Bank of Cape Fear*, 65 No. Car. 13.

8 *Bank of Ky. v. Wister*, 2 Peters. 318; *Marine Bank v. Fulton Bank*, 2 Wall. 252; *Master of Franklin Bank*, 1 Paige, 249; 19 Am. Dec. 413.

9 *Foster v. Essex Bank*, 17 Mass. 479; *Hale v. Rawallie*, 8 Kan. 137.

10 *Foster v. Essex Bank*, 17 Mass. 479; and see *White v. Franklin Bank*, 22 Pick. 181; *Cushman v. Ill. Starch Co.* 79 Ill. 281.

11 See *Marine Bank v. Fulton Bank*, 2 Wall. 252; *Lancaster County Nat. Bank v. Smith*, 63 Pa. St. 67; *Smith v. First Nat. Bank*, 99 Mass. 605.

12 *Thatcher v. Bank of State*, 5 Sandf. 121.

§ 220. Repayment of deposits.—In the case of a general deposit, the money deposited is a debt due from the bank to the depositor, which raises an implied assumption for its repayment.¹ No engagement under seal is necessary to bind the bank to repay.² But a previous demand by the depositor, or by some person authorized by him by his order, is indispensable to the maintenance of an action for the deposit;³ unless circumstances are affirmatively shown which amount to a legal excuse.⁴ The statute of limitations does not begin to run,⁵ nor, except by special contract, is a bank chargeable with interest on sums de-

posited, until demand of payment.⁶ Presumptively, the money on deposit in bank belongs to the depositor;⁷ and the bank is justified in paying over the money on the checks of the depositor, until notice of the claims of a third person upon the fund deposited.⁸ If a deposit is made in the name of a firm, and the bank pays it out on the individual check of one of the firm in his own name only, it can only justify by showing that the money thus drawn was applied to the use of the firm.⁹ If a trustee deposits trust moneys in his own name with his individual money, the former remains, in view of equity, the property of the *cestui que trust*, and if it can be traced into the bank while it remains there, the owner can reclaim it.¹⁰ If a bank, holding a trust fund, colludes with the trustee in a misapplication of it, the bank is liable to the *cestui que trust* for any loss thereby incurred.¹¹ A deposit in a savings-bank, made by a person in his or her name as trustee for another, is a complete and valid transfer of the title to the fund;¹² the title to it vests immediately in the donee, and the personal representative of the donor cannot collect it from the bank.¹³ A banker is not bound to pay money held for one on deposit, upon an oral order;¹⁴ by the usages of the banking business, he is entitled to some written evidence of the order for money upon payment thereof.¹⁵ Nor has the depositor a right to the particular money deposited, as in the case of a special deposit.¹⁶ But if he deposits funds which are current at the time, he may insist on payment in current funds, although the funds deposited have, in the meantime depreciated;¹⁷ on the other hand, if he deposits bank-bills as depreciated paper, he cannot draw for par funds.¹⁸

1 *Boyd v. Bank of Cape Fear*, 65 No. Car. 13; *Foster v. Essex Bank*, 17 Mass. 479; *Bank of Ky. v. Wister*, 2 Peters, 318.

2 *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326.

3 *Adams v. Orange County Bank*, 17 Wend. 514; *Johnson v. Farmers' Bank*, 1 Har. (Del.) 117, 486; *Brahm v. Adkins*, 77 Ill. 263; *Bank of Mo. v. Benoit*, 10 Mo. 519.

4 See *Farmers' Bank v. Planters' Bank*, 10 Gill. & J. 422; *Watson v. Phoenix Bank*, 8 Metc. 217; *Brahm v. Adkins*, 77 Ill. 263.

5 Girard Bank v. Bank of Penn. Township, 39 Pa. St. 92; Adams v. Orange County Bank, 17 Wend. 514.

6 Parkersburg Nat. Bank v. Als, 5 W. Va. 50.

7 Arnold v. Macungie Savings Bank, 71 Pa. St. 213.

8 McEwen v. Davis, 29 Md. 109; Swartwout v. Mechanics' Bank, 5 Denio, 554; School District v. First Nat. Bank, 102 Mass. 174; First Nat. Bank v. Bache, 71 Pa. St. 213; Farmers' etc. Nat. Bank v. King, 57 Id. 202; Dary v. N. Y. Chem. Manuf. Co. 2 Hall, 550; Commercial Bank v. Jones, 18 Tex. 811.

9 Coote v. Bank of U. S. 3 Cranch C. C. 50.

10 Van Alen v. American Bank, 52 N. Y. 1; Disbrow v. Mills, 2 Hun, 132; 4 Thomp. & C. 632.

11 Bank of Greensboro v. Clapp, 76 No. Car. 482; and see Rodenham v. Hoskyns, 2 De Gex M. & G. 503; Lowry v. Com. etc. Bank, Tauey, 312.

12 Martin v. Funk, 75 N. Y. 134. Compare Minor v. Rogers, 40 Com. 512; Clark v. Clark, 108 Mass. 522; Brabrook v. Sav. Bank, 104 Id. 228; Morgan v. Mallesou, Law R. 10 Eq. 475.

12 Boone v. Citizens' Sav. Bank, 21 Hun, 235.

14 McEwen v. Davis, 39 Ind. 109.

15 McEwen v. Davis, 39 Ind. 109.

16 Ruffin v. Comm'rs, 69 No. Car. 496; Lilly v. Comm'rs, 69 Id. 300; and see Planters' bank v. Union Bank, 16 Wall. 483; Beatty v. McCleod, 11 La. An. 76.

17 Willets v. Paine, 43 Ill. 432.

18 Willets v. Paine, 43 Ill. 432. Compare Corbit v. Bank of Smyrna, 2 Har. (Del.) 235; Thompson v. Riggs, 5 Wall. 663; Cushman v. Carver, 51 Ill. 509; Greves v. La. State Bank, 22 La. An. 228.

§ 221. **Liens.**—Bankers, who are strictly such, and who are dealers in money, have a general lien on all moneys and funds¹ and paper securities² of a depositor, which are in their possession, for the amount of the general balance;³ provided there be no circumstances in any case inconsistent therewith,⁴ or unless such securities were delivered to the banker under a particular agreement.⁵ Generally, the bank may apply a general deposit to the payment of any demand it has against the depositor.⁶ But if funds are deposited in a bank for a special purpose, known to the bank, it cannot refuse to apply them to such purpose, on the ground that a debt is due to it by the depositor.⁷ A banker has no lien on securities left with him by mistake;⁸ nor upon property subject to a trust, and improperly left with him by the trustee, without notice of the trust,⁹ provided the *cestui que trust* has been guilty of no misconduct or negligence depriving him of his counter

rights.¹⁰ And no lien will attach on funds standing to the credit of a depositor, unless there is an indebtedness actually existing and matured;¹¹ thus, if a bank holds a note of the depositor, which it discounted for him, the bank will have no lien until the note matures.¹² And where a valid lien has been established, the bank will lose it by taking security for the debt, payable at some distant day.¹³

1 *Commercial Bank v. Hughes*, 17 Wend. 94; *State Bank v. Armstrong*, 4 Dev. 519; *Scott v. Franklin*, 15 East, 428; *In re Williams*, 3 Ired. Eq. 346.

2 *Bank of Metropolis v. New Eng. Bank*, 1 How. 234; 17 Peters. 174; and see *Re European Bank*, Law R. 8 Ch. 41; *Re General Prov. Assn. Co.* Law R. 14 Eq. 507; *Ex parte Wakefield Bank*, 19 Ves. 25.

3 *Davis v. Bowsler*, 5 Term Rep. 488; *McDowell v. Bank of Wilmington*, 1 Harr. 389; *Brandao v. Barnett*, 3 Man. Gr. & S. 519; 12 Clark & F. 805; and see *O'Connor v. Marjoribanks*, 4 Man. & G. 435.

4 *Grant v. Taylor*, 3 Jones & S. 338; 52 N. Y. 627.

5 *Bank of Metrop. v. New Eng. Bank*, 1 How. 234; 17 Peters. 174.

6 *Commercial Bank v. Hughes*, 17 Wend. 94; and see *Graves v. Dudley*, 20 N. Y. 74.

7 *Bank of U. S. v. McAlester*, 9 Pa. St. 475.

8 *Lucas v. Dorrien*, 7 Taunt. 279; and see *Petrie v. Myers*, 54 How. Pr. 513.

9 *Locke v. Prescott*, 32 Beav. 261; *Manningford v. Toleman*, 1 Call, 670.

10 *Manningford v. Toleman*, 1 Call, 670; *Murray v. Pinkett*, 12 Clark & F. 764.

11 *Beckwith v. Union Bank*, 4 Sand. 604; 9 N. Y. 211; *Jordon v. Shoe & Leather Nat. Bank*, 12 Hun, 512; 6 W. Dig. 11; *aff'd*, 7 W. Dig. 264; 74 N. Y. 467.

12 *Giles v. Perkins*, 9 East 12. Compare *Re Farnsworth*, 5 Biss. 233.

13 *Hewison v. Guthrie*, 2 Bing. (N. C.) 755.

§ 222. **Loans and discounts.**—The power to carry on the business of banking by discounting bills, notes, and other evidences of debt, is not a power to traffic in such securities as a species of personal property,¹ but a power to loan money thereon, with the right to take lawful interest in advance.² And power to "lend money upon such terms and rates of interest as may be agreed upon" does not authorize the bank to charge more than the legal rate fixed by the general laws of the state;³ but in discounting drafts at the highest rate allowed by law, the bank may in addition charge the current rate of exchange, as a

compensation for collecting the drafts.⁴ Authority given to a bank, in general terms, to deal in bills of exchange, empowers it to purchase foreign bills as well as inland;⁵ that is, to purchase bills payable in another state.⁶ But privileges given to a bank to discount moneys deposited for safe-keeping does not extend to special deposits.⁷ It is no defense to an action by a bank against a person indebted upon a valid bill or note, that the plaintiff acquired the demand by purchase at a discount greater than such corporations are allowed by statute to take.⁸ Nor can one who has borrowed money from a bank, upon securities which it was prohibited from taking for a loan, avail himself of the prohibition as an answer to the claim of the bank to be repaid.⁹ And where authority is given to buy bills of exchange upon banking principles, a purchase of such bills is not to be deemed invalid because the bank bought them from another bank, and paid for them in the depreciated notes of the latter.¹⁰ Making a note negotiable at bank is an authority to the bank to advance to the holder, on the credit of the maker, the sum expressed in the note.¹¹ All offsets against the note are waived, and cannot be again set up after the note has been discounted.¹² If property be pledged to a bank as collateral security for a discount or loan, the bank is liable only for good faith and ordinary care;¹³ and a receipt for the property given by the cashier is not a contract increasing the common-law liability of the bank as pledgee.¹⁴

1 *First Nat. Bank v. Pierson*, 16 Alb. L. J. 319; *Thomp. Nat. Bank Case*, 637; *Farmers' etc. Bank v. Baldwin*, 23 Minn. 198. But compare *Pape v. Capital Bank*, 20 Kan. 440; 27 Am. R. 183.

2 *Niagara County Bank v. Baker*, 15 Ohio St. 68; *Talmage v. Pell*, 7 N. Y. 324; *First Nat. Bank v. Ocean Nat. Bank*, 60 Id. 278; *Wiley v. First Nat. Bank*, 47 Vt. 546; 13 Am. R. 122; *Hoffman v. Mut. Life Ins. Co.* 92 U. S. 161. Compare *State Bank v. Criswell*, 15 Ark. 230; *People v. Oakland Co. Bank*, 1 Dong. (Mich.) 282.

3 *Rimonton v. Danier*, 71 No. Car. 478. Compare *McLean v. Lafayette Bank*, 3 McLean, 587; *Farmers' Bank v. Burchard*, 33 Vt. 346; *Seneca Co. Bank v. Lamb*, 26 Barb. 555.

4 *Central Bank v. St. John*, 17 Wis. 157.

5 *Bank of Augusta v. Earle*, 13 Peters, 519; and see *City Bank v. Beach*, 1 Blatchf. 425.

- 6 *Bank of Augusta v. Earle*, 13 Peters, 519.
- 7 *Foster v. Essex Bank*, 17 Mass. 479.
- 8 *Onelda Bank v. Ontario Bank*, 21 N. Y. 490. Compare *Hurd v. Green*, 17 Hun, 327; *Sistare v. Best*, 16 id. 611.
- 9 *Allan v. Freedmen's Sav. etc. Co.* 14 Fla. 418.
- 10 *Lafayette Bank v. State Bank*, 4 McLean, 208.
- 11 *Mandeville v. Union Bank*, 9 Cranch, 9.
- 12 *Mandeville v. Union Bank*, 9 Cranch, 9.
- 13 *Dearbourn v. Union Nat. Bank*, 58 Mo. 273; 61 id. 369. Compare *Scott v. Crews*, 2 So. Car. 522; *Re Haven v. Kensington Nat. Bank*, 81 Pa. St. 95; *Ray v. Bank of Ky.* 10 Bush, 344; *Smith v. First Nat. Bank*, 99 Mass. 605.
- 14 *Jenkins v. Nat. Village Bank*, 56 Mo. 375.

§ 223. Collections.—Power to make collections upon business paper is incidental to the banking business, and need not be expressly conferred.¹ Banks sometimes charge a commission for collection;² but when no direct charge is made, the reasonable expectation that, according to the usual course of business, the bank may enjoy the use of the proceeds for a longer or shorter time, is a sufficient consideration for the undertaking to collect.³ Generally, when a bank receives paper for collection, and no special agreement is made, the contract to be implied is one of agency merely;⁴ and the duties and liabilities of the bank are those of an agent of the holder or depositor.⁵ But the bank is in no sense the agent of the maker of the paper,⁶ and is not liable to him for a failure to account to the owner for the proceeds.⁷ If a note or other instrument is deposited for collection at the bank named in it as the place of payment, the bank becomes the agent of the payee, and not of the maker;⁸ but if the obligation be not presented at the bank for payment on the day of maturity, and the maker deposits money with the bank to meet it, then the bank becomes the agent of the maker, and not of the payee.⁹ A bank receiving negotiable paper for collection, is bound to exercise reasonable care and diligence in the discharge of its assumed duties;¹⁰ and whether payable at its counter or elsewhere, is liable for any neglect of duty occurring in its collection, by which any of the parties are discharged.¹¹ If the paper

ought to be accepted, it is the duty of the bank to use diligence in presenting it, and in giving notice if there is a failure of due acceptance.¹² But the bank is not liable for neglect to present a draft, left for collection, where presentment was not necessary to charge the parties, and would have been useless if made.¹³ It is the duty of the bank to place the paper in the hands of a notary for protest, when necessary;¹⁴ in which case, the notary is the agent of the bank, and the bank is liable for any neglect of duty by him, by which any of the parties are discharged.¹⁵ It has, however, been held that the bank, by showing the delivery of the paper to a notary for demand and protest in due time, is *prima facie* exonerated from liability;¹⁶ and that if the bank places the paper in the hands of the notary to whom its own business is uniformly intrusted, it will not be liable for the neglect of the notary to protest the note, or to notify the proper parties.¹⁷ If a bank mistakes the date of a note received for collection, and presents it for payment before the proper time, whereby the indorser is discharged, it is responsible.¹⁸ And if a bill sent to a bank for collection is accidentally lost, through the neglect of the bank to take sufficient care of letters brought to it by mail, a presumption of negligence in the bank is raised, and the burden of proof to excuse the negligence is thrown upon the bank.¹⁹ The courts in many of the states have adopted the rule, that paper payable at a distant place, and left with a bank for collection, is presumed to be intended to be transmitted to and collected by a suitable sub-agent, at the place where payable;²⁰ and, as in the case of paper expressly left for transmission only,²¹ if the bank acts in good faith, it is not liable for the neglect or default of the sub-agent.²² But the rule adopted in New York holds the bank first receiving the paper answerable for the conduct of any and all the subsequent agents, unless there be some agreement to the contrary, express or implied.²³ And such is also the rule in Ohio.²⁴ The duty of a bank

to collect paper left with it for collection, is raised in behalf of such person as may be beneficially interested in having the duty performed;²⁵ as, where A. leaves a note for collection, and B. becomes the owner of it before the time for the performance of the duty arrives, B. is the proper person to sue for an injury caused by the neglect of that duty.²⁶ After a collection made, the bank becomes a simple contract debtor to the depositor, for the proceeds;²⁷ and the amount may be properly passed to the credit of the depositor in his general account.²⁸ If a note deposited for collection is credited to the depositor in his general account, then overdrawn, and the bank fails, the proceeds are assets available to the general creditors,²⁹ notwithstanding the account was made good by other deposits prior to the collection of the note.³⁰ The measure of damages in an action against a bank, to recover for the injury resulting from neglect of duty in the undertaking to collect, is the actual loss sustained by the party interested in the paper.³¹ It is not within the scope of a collecting bank's agency to employ counsel and bring suit upon paper left with it for collection.³²

1 *Tyson v. State Bank*, 6 Blackf. 225.

2 See *Hall v. Bank of State*, 3 Rich. 366; *Thompson v. Bank of State*, 3 Hill, (S. C.) 77; *Curtis v. Leavitt*, 15 N. Y. 9, 167.

3 *Smedes v. Utica Bank*, 20 Johns. 372; *Hall v. Bank of State*, 3 Rich. 366; *Shields v. Blackburne*, 1 Black. II. 158.

4 *Montgomery Co. Bank v. Albany City Bank*, 7 N. Y. 459; *Bank of Mobile v. Huggins*, 3 Ala. 206. Compare *McBride v. Farmers' Bank*, 26 N. Y. 450.

5 *Bank of Mobile v. Huggins*, 3 Ala. 206; *Alley v. Rogers*, 19 Gratt. 366; *Daly v. Butchers' etc. Bank*, 56 Mo. 94. See *Chapman v. White*, 6 N. Y. 412.

6 *Smith v. Essex County Bank*, 23 Barb. 627.

7 *Smith v. Essex County Bank*, 22 Barb. 627. See also *Runyon v. Latham*, 5 Ired. 551.

8 *Ward v. Smith*, 7 Wall. 447.

9 *Ward v. Smith*, 7 Wall. 447.

10 *Fabens v. Mercantile Bank*, 23 Pick. 330; *Nat. Bank of Commerce v. Merchants' Nat. Bank*, 91 U. S. 92.

11 *Ayrault v. Pacific Bank*, 47 N. Y. 570; 7 Am. R. 489.

12 *Montgomery Co. Bank v. Albany City Bank*, 7 N. Y. 459; *Bank at Montgomery v. Knox*, 1 Ala. 143; *Walker v. Bank of State*, 9 N. Y. 582; *Steele v. Russell*, 5 Neb. 211; *Bank of New Hanover v. Kenlan*, 76 No. Car. 340; *Capitol State Bank v. Lane*, 62 Miss. 677.

13 *West Branch Bank v. Fulmer*, 3 Pa. St. 399; *Mobley v. Clark*, 28 Barb. 390; and see *Jacobsohn v. Belmont*, 7 Bosw. 14.

14 *Georgia Nat. Bank v. Henderson*, 46 Ga. 487; *Citizens' Bank v. Howell*, 8 Md. 530; and see *Bank of Mobile v. Huggins*, 3 Ala. 206; *Fabens v. Mercantile Bank*, 23 Pick. 330; *Borup v. Nininger*, 5 Minn. 523.

15 *Ayrault v. Pacific Bank*, 47 N. Y. 570; 7 Am. R. 487; and compare *Hoover v. Wise* 91 U. S. 308. *Contra*: *Daly v. Butchers' etc. Bank*, 56 Mo. 93; *Etna Ins. Co. v. Allen Bank*, 25 Ill. 243; *Citizens' Bank v. Howell*, 8 Md. 530.

16 *Agr. Bank v. Commercial Bank*, 7 Smedes & M. 592; *Bowling v. Arthur*, 34 Miss. 41; *Stacy v. Dane County Bank*, 12 Wis. 629.

17 *Citizens' Bank v. Howell*, 8 Md. 530; *Baldwin v. Bank of La. 1 La. An. 13*; and see *Bank of Owego v. Babcock*, 5 Hill, 152; *Gerhardt v. Boatmen's Sav. Inst.* 38 Mo. 60.

18 *Bank of Del. Co. v. Broomhall*, 38 Pa. St. 135.

19 *Chicopee Bank v. Phila. Bank*, 8 Wall. 641.

20 See *Bank of Washington v. Triplett*, 1 Peters, 25.

21 See *Mechanics' Bank v. Earp*, 4 Rawle, 384.

22 *Dorchester etc. Bank v. New Eng. Bank*, 1 Cush. 177; *Wingate v. Mechanics' Bank*, 10 Pa. St. 104; *Daly v. Butchers' etc. Bank*, 56 Mo. 93; *East Haddam Bank v. Scovill*, 12 Conn. 303; *Hyde v. Planters' Bank*, 17 La. 560; *Stacy v. Dane County Bank*, 12 Wis. 629; and see *Van Wart v. Woolley*, 3 Barn. & C. 429. But compare *Mackersay v. Ramsay*, 9 Clark & F. 818.

23 *Ayrault v. Pacific Bank*, 47 N. Y. 570; 7 Am. R. 489; *Allen v. Merchants' Bank*, 23 Wend. 215; *Indig v. Nat. City Bank*, 16 Hun, 200.

24 *Reeves v. State Bank*, 8 Ohio St. 465; and see *Young v. Noble*, 2 Disn. 435.

25 *Bank of Utica v. McKinster*, 11 Wend. 473.

26 *Bank of Utica v. McKinster*, 11 Wend. 473.

27 *Marine Bank v. Rushmore*, 28 Ill. 463. See § 220, *ante*.

28 *Marine Bank v. Rushmore*, 28 Ill. 463; *Re Bank of Madison*, 5 Biss. 515.

29 *Re Bank of Madison*, 5 Biss. 515.

30 *Re Bank of Madison*, 5 Biss. 515. Compare *Re Farnsworth*, 5 Id. 223.

31 *Tyson v. State Bank*, 6 Blackf. 225; *McKinster v. Bank of Utica*, 9 Wend. 46; 11 Id. 473.

32 *Crow v. Mechanics' etc. Bank*, 12 La. An. 602; *Wetherill v. Bank of Penn'a*, 1 Miles, 399.

§ 224. Checks.—In paying out money held for one on deposit, the banker is entitled, by established usage, to the protection of a written check.¹ A bank-check is substantially the same as an inland bill of exchange, and the same rules are, in general, applicable to both.² But a check is always drawn on a bank or banker,³ and no days of grace are allowed;⁴ so, a check is never presentable for mere acceptance, but only for payment.⁵ The

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formal parts of a check are, the signature of the drawer,⁶ a statement of the sum to be paid,⁷ the address,⁸ the date,⁹ and sufficient words of request to pay the sum therein named.¹⁰ A check is an appropriation of so much of the maker's funds in the bank as is necessary to meet it;¹¹ or if the maker's deposit is less than the sum for which the check calls, at the time of presentation, it is an appropriation of the deposit, whatever it may be.¹² The maker has no right to withdraw the money after the delivery of the check,¹³ and he cannot object to delay in presenting it, unless he shows some special injury to himself therefrom.¹⁴ The bank owes no duty to the holder of a check until it is presented and accepted;¹⁵ and the holder cannot sue the bank for refusing payment, in the absence of proof that the check was accepted by the bank,¹⁶ or charged against the drawer.¹⁷ But in case of the dishonor of a check, the holder has recourse against the drawer, although, at the time the check was presented, the bank held funds of the drawer sufficient to pay it;¹⁸ and the drawer has his remedy against the bank.¹⁹ Post-dated checks are payable on, or at any time after, the day of their date;²⁰ and payment by a bank of such a check before that day, is a payment in its own wrong,²¹ and is no defense to an action for the amount of the fund, by the assignee in good faith of the fund.²² The certificate of a bank that a check, drawn payable by the bank, is "good," operates as an engagement of the bank to pay the debt as its own.²³ It is an unconditional promise by the bank to hold sufficient funds of the drawer to meet the check.²⁴ The sum mentioned in the check ceases to stand to the credit of the drawer, and thenceforth passes to the credit of the holder, and is specifically appropriated to pay the check when presented.²⁵ A certificate that the check is "good" is equivalent to an acceptance.²⁶ The bank certifies to the genuineness of the signature of the drawer, and that he has funds sufficient to meet the check;²⁷ but does not warrant the genuineness of the

body of the check, either as to payee or amount.²⁸ The cashier has authority, in virtue of his office, to certify checks;²⁹ and the fact that he certified a check as "good," while away from his banking-house, is no objection to its validity.³⁰

1 *McEwen v. Davis*, 39 Ind. 109.

2 See *Harker v. Anderson*, 21 Wend. 372; *Lunt v. Bank of North America*, 43 Barb. 221; *Woodruff v. Merchants' Bank*, 25 Wend. 673; *Barnet v. Smith*, 10 Fost. 256; *Conroy v. Warren*, 3 Johns. Cas. 259; *Billing v. Devaux*, 3 Mau. & G. 511; *Carew v. Duckworth*, Law R. 4 Ex. 313.

3 *Harris v. Clark*, 3 N. Y. 93; *Keene v. Beard*, 8 Com. B. N. S. 372.

4 *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. 604; *Sutton v. Toomer*, 7 Barn. & C. 416; *Morrison v. Balley*, 5 Ohio St. 13; *Westminster Bank v. Wheaton*, 4 R. I. 30; *Hare v. Copland*, 13 I. R. C. L. 426.

5 See *Keene v. Beard*, 8 Com. B. N. S. 372; *Matter of Brown*, 2 Story 502; *Oberman v. Hoboken City Bank*, 31 N. J. L. 533; *Veazie Bank v. Wynn*, 40 Mo. 60; *Morse v. Mass. Nat. Bank*, 1 Holmes, 200.

6 *Saunderson v. Jackson*, 2 Bos. & P. 238.

7 See *Corgan v. Frew*, 39 Ill. 31; *Rastell v. Draper, Croke*, 88; *Kearney v. King*, 2 Barn. & Ald. 301.

8 See *Harker v. Anderson*, 21 Wend. 372; *Murray v. Judah*, 6 Cowen, 484.

9 See *Godin v. Bank of Commonwealth*, 6 Duer, 76; *Begbie v. Levy*, 1 Cromp. & J. 180; *Strickland v. Mansfield*, 8 Q. B. 675; *Ward v. Oxford Railw. Co.* 2 De Gex M. & G. 750.

10 See *Wells v. Brigham*, 6 Cush. 6.

11 *Emery v. Hobson*, 63 Me. 32; *Deener v. Brown*, 1 McAr. 350. Compare *Egerton v. Fulton Nat. Bank*, 41 How. Pr. 216; *Strain v. Gourdin*, 11 Bank. R. 156; *Van Allen v. Am. Nat. Bank*, 3 Lans. 517; *Hopkinson v. Forster*, Law R. 19 Eq. 74.

12 *Bromley v. Com. Nat. Bank*, 9 Phila. 522. But compare *Murray v. Judah*, 6 Cowen, 484; *Foster v. Bank of London*, 3 Fost. & F. 214; *Mum v. Burch*, 23 Ill. 35.

13 *Deener v. Brown*, 1 McAr. 350; and see *Union Nat. Bank v. Ocean County Bank*, 80 Ill. 212. Compare *Etna Nat. Bank v. Fourth Nat. Bank*, 45 N. Y. 82; 7 Am. R. 314.

14 *Keene v. Beard*, 8 Com. B. N. S. 372; *Emery v. Hobson*, 63 Me. 32; *Stewart v. Smith*, 17 Ohio St. 82; *Smith v. Jones*, 2 Bush, 103; *Woodin v. Krazee*, 6 Jones & S. 170. Compare *Smith v. Miller*, 43 N. Y. 171; 3 Am. R. 640; *Daniels v. Kyle*, 5 Ga. 245; *Bickford v. First Nat. Bank*, 42 Ill. 238.

15 *Essex County Nat. Bank v. Bank of Montreal*, 15 Am. Law Reg. 419; *First Nat. Bank v. Whitman*, 14 U. S. 343; *Carr v. Nat. Sec. Bank*, 107 Mass. 45; 9 Am. R. 6; *Duncan v. Berlin*, 60 N. Y. 151; *Bank of Republic v. Millard*, 10 Wall. 152.

16 *Bank of Republic v. Millard*, 10 Wall. 152.

17 *Bank of Republic v. Millard*, 10 Wall. 152; and see *Seventh Nat. Bank v. Cook*, 73 Pa. St. 751; 13 Am. R. 751; *Carr v. Nat. Sec. Bank*, 107 Mass. 45; 9 Am. R. 6; *Schroeder v. Central Bank*, 24 Week. R. 710; 34 L. T. N. S. 736.

18 *Moses v. Franklin Bank*, 34 Md. 574; *Duncan v. Berlin*, 60 N. Y. 151; *Simpkins v. Apothecary*, 5 Ex. 253.

19 *Downes v. Phoenix Bank*, 6 Hill, 297; *Marzetti v. Williams*, 1 Barn. & Ad. 415; *Rollin v. Steward*, 14 Com. B. 5:5; *Boyd v. Emerson*, 2 Ad. & E. 184, 207; *Watts v. Christie*, 11 Beav. 546. Compare *Launceston Bank v. Woodward*, 18 Pa. St. 357.

20 *Taylor v. Slip*, 1 Vroom, 284; and see *Salter v. Burt*, 20 Wend, 265; *Matter of Brown*, 2 Sto. y. 602; *Bull v. O'Sullivan*, Law R. 6 Q. B. 289; *Gatty v. Fry*, Law R. 2 Ex. Div. 265.

21 *Taylor v. Slip*, 1 Vroom, 284. A post-dated check payable to order is not illegal: *Emanuel v. Roberts*, 9 Best & Smith, 121.

22 *Godin v. Bank of Com.* 6 Duer, 76.

23 *Meads v. Merchants' Bank*, 25 N. Y. 143; *Girard Bank v. Bank of Penn. Township*, 33 Pa. St. 92; *Lickford v. First Nat. Bank*, 42 Ill. 238.

24 *Bounds v. Smith*, 42 Ill. 245.

25 *Farmers' etc. Bank v. Butchers' etc. Bank*, 4 Duer, 219; *Com. Bank v. Hughes*, 17 Wend. 94; *Seventh Nat. Bank v. Cook*, 73 Pa. St. 483.

26 See *Meads v. Merchants' Bank*, 25 N. Y. 143; *First Nat. Bank v. Leach*, 53 N. Y. 350; *Simpson v. Pacific Mut. Life Ins. Co.* 44 Cal. 139; *Essex County Nat. Bank v. Bank of Montreal*, 15 Am. Law Reg. 418; *Merchants' Bank v. State Bank*, 10 Wall. 604; *Nolan v. Bank of New York etc.* 67 Barb. 24.

27 *Nat. Bank of Commerce v. Nat. Mech. Bank*, 55 N. Y. 211; 14 Am. R. 232; *Welsch v. Denison*, 10 N. Y. 68. Compare *First Nat. Bank v. Ricker*, 71 Ill. 43; *Schroeder v. Harvey*, 75 Id. 638; *Levy v. Bank of America*, 24 La. An. 220.

28 *Marine Nat. Bank v. Nat. City Bank*, 59 N. Y. 67; *Security Bank v. Nat. Bank*, 67 Id. 454; and see *Mussey v. Eagle Bank*, 9 Met. 306; *Espy v. Bank of Cincinnati*, 18 Wall. 604; *City Bank v. First Nat. Bank*, 45 Tex. 201; *Bank of North America v. Nat. Bank*, 59 N. Y. 628; *Ex parte Swan*, 7 Com. B. N. S. 400. But see *Barnet v. Smith*, 30 N. H. 256; *La. Nat. Bank v. Citizens' Bank*, 1 La. Law J. 80; 23 La. An. 189; *Helwege v. Hibernia Nat. Bank*, 28 Id. 520; *Belknap v. Nat. Bank*, 100 Mass. 376.

29 *Badger v. Bank of Cumberland*, 26 Me. 428; and see *Clarke Nat. Bank v. Bank of Albion*, 53 Barb. 532; *Pope v. Bank of Albion*, 59 Barb. 226.

30 *Merch. Nat. Bank v. State Nat. Bank*, 10 Wall. 604.

§ 225. **Certificates of deposit.**—A certificate of deposit, issued by a bank, is an evidence of debt in the nature of a receipt.¹ It is intended to represent moneys actually left with the bank for safe-keeping, which are to be retained until the depositor actually demands them.² It is, however, negotiable, if expressed in negotiable words;³ and so far as negotiability is concerned, it must be placed on the same footing as a promissory note.⁴ Some of the authorities hold, that a certificate of deposit, in the usual form, payable to the order of the depositor, is in the nature of commercial paper,⁵ and that the payee is chargeable upon his indorsement thereof.⁶ By other

authorities it is regarded rather as an agreement than a promissory note.⁷

1 Hotchkiss v. Mosher, 48 N. Y. 478; Payne v. Gardiner, 29 Id. 146, 171. See Moore v. Ulster Bank. Co. 11 I. R. C. L. 512.

2 Nat. Bank v. Wash. Co. Nat. Bank, 5 Hun, 605; and see Brown v. McElroy, 52 Ind. 404; Meador v. Dollar Sav. Bank, 56 Ga. 605.

3 Nat. State Bank v. Ringel, 51 Ind. 393; Johnson v. Henderson, 76 No. Car. 227.

4 Welton v. Adams, 4 Cal. 37; Poorman v. Mills, 35 Id. 118; Pardee v. Fish, 60 N. Y. 265. A certificate of deposit payable to order, in "currency," is negotiable: Klauber v. Biggerstaff, 47 Wis. 551; 32 Am. R. 773. But see *contra*, Huse v. Hamblin, 29 Iowa, 501; 4 Am. R. 244.

5 Kilgore v. Bulkley, 14 Conn. 363; Cate v. Patterson, 25 Mich. 191; Lindsey v. McClelland, 18 Wis. 431; Laughlin v. Marshall, 19 Ill. 390; White v. Franklin Bank, 22 Pick. 181; Cushman v. Ill. Starch Co. 79 Ill. 281.

6 Pardee v. Fish, 60 N. Y. 265; 19 Am. R. 176.

7 See Paterson v. Poindexter, 6 Watts & S. 227; Charnley v. Dulles, 8 Id. 353; Silbree v. Tripp, 15 Mees. & W. 23; Talladega Ins. Co. v. Woodward, 44 Ala. 287.

§ 226. Bank-notes or bills.—A bank-note or bill is simply the promissory note of the bank, payable on demand to the bearer.¹ If payable at any future time certain, it is a bank post-note;² but being intended to circulate after the time of payment has arrived, it is subject to the rules applicable to ordinary bank-notes.³ Any bank having power to issue paper for circulation may issue post-notes if there is no limitation in the charter as to the kind of paper to be issued.⁴ And although a bank violates its charter by circulating as currency notes or bills not payable on demand, this fact does not vitiate a contract made by the bank with other parties involving the circulation of such notes or bills.⁵ Strictly speaking, bank-notes are not money,⁶ and no state has power to render them such.⁷ But in the ordinary transaction of business they pass current as money by virtue of a tacit agreement to that effect.⁸ They are a good tender in payment of debts, unless specially objected to at the time;⁹ and they pass under the word "money" in a will.¹⁰ So they may be made, by statute, a legal tender in payment of debts due the bank itself which issued them;¹¹ and if so, the receiver of the bank,¹² or the as-

signees of an insolvent bank, must receive them in payment of debts due the bank.¹³ But it is otherwise if the bills were purchased by the debtor subsequently to the failure of the bank.¹⁴ If a bank sues a debtor, the latter may set off bills of the bank held by him, at par.¹⁵ Generally, in the absence of circumstances excusing a demand,¹⁶ a cause of action does not accrue on bank-bills until a demand and refusal.¹⁷ But there is no necessity for a demand upon each separate bill; one demand in the aggregate upon a package of bills is sufficient.¹⁸ Where interest is allowed at all, the holder of a bank-note is entitled to interest from the time of demand and refusal to pay, to the date of actual payment.¹⁹ If a bank has suspended payment, and its bills no longer circulate as money, the statutes of limitation apply to them as to other contracts.²⁰ It is the duty of the bank to redeem its bills with reasonable dispatch;²¹ and unreasonable delay amounts to a refusal of payment.²² A bank is bound to know its own paper, and the receipt by it of forged notes purporting to be its own, must be deemed an adoption of them.²³ If a bank-bill, completely executed in every material respect, be stolen from the bank and fraudulently circulated, it is good as against the bank in the hands of a *bona fide* holder for value.²⁴ And generally, any *bona fide* holder for value of lost or stolen bank-bills, can recover upon them against the bank.²⁵ So if the total and absolute destruction of a bank-note is clearly established, the bank is bound to pay the last holder or owner the amount of it.²⁶ And where the holder of a bank-note divides it, for the purpose of transmission by mail, and loses one-half, he may recover the amount of the whole note;²⁷ but no other person can recover on the other half.²⁸ If a bank receives the forged notes of other banks upon general deposit, and credits the depositor therefor at the time, a debt from the bank to him is not thereby created,²⁹ as would be the case if the notes were genuine,³⁰ or were forged notes purporting to be its own.³¹

A deposit with a bank of a parcel of its own bills as collateral for a loan, constitutes the bank a bailee and not a debtor;⁸² and the bank will be liable in trover if it fails to return the deposit.⁸³

1 See 1 Bouv. Dict. 167; *McDonnell v. Murray*, 9 Ir. R. C. L. 495; 1 L. T. N. S. 498.

2 *Fulton Bank v. Phoenix Bank*, 1 Hall, 619. See *Forbes v. Marshall*, 11 Ex. 167.

3 *Fulton Bank v. Phoenix Bank*, 1 Hall, 619.

4 *Campbell v. Miss. Union Bank*, 6 How. (Miss.) 625. See *Root v. Wallace*, 4 McLean, 8; *Bank Comm'rs v. St. Lawrence Bank*, 7 N. Y. 513; *International Bank v. Bradley*, 19 id. 245.

5 *Canon v. McNab*, 48 Ala. 99.

6 *Governor v. Carter*, 3 Hawks, 328; *Morrill v. Brown*, 15 Pick. 173, 177.

7 U. S. Const. art. 1, § 10.

8 *Pierson v. Wallace*, 2 Eng. (Ark.) 232; *Handy v. Dobbin*, 12 Johns. 220; *Bradley v. Hunt*, 5 Gill & J. 68; *Bank of U. S. v. Bank of Ga.* 10 Wheat. 333; *Wright v. Reed*, 3 Term Rep. 554.

9 *Hoyt v. Byrnes*, 11 Me. 475; *Bank of U. S. v. Bank of Ga.* 10 Wheat. 333; *Warren v. Mains*, 7 Johns. 476; *Gillard v. Wise*, 5 Barn. & C. 134; and see *Legal Tender Cases*, 12 Wall. 457; *Frank v. Wessels*, 64 N. Y. 155.

10 *Chapman v. Hart*, 1 Ves. Sr. 271.

11 *Suffolk Bank v. Lincoln Bank*, 3 Mason, 1; *Railey v. Bacon*, 26 Miss. 455; *Dunlap v. Smith*, 12 Ill. 399; *Hallowell etc. Bank v. Howard*, 13 Mass. 235; *Farmers' Bank v. Willis*, 7 W. Va. 31. When the law grants authority to a bank to issue bills to circulate as the representative of money, it tacitly annexes to the grant the condition that the bank shall accept its own bills in payment of debts due it: *Blount v. Windley*, 68 No. Car. 1; 12 Am. R. 616.

12 *Moise v. Chapman*, 24 Ga. 240; and see *American Bank v. Wall*, 56 Me. 167.

13 *Com. Bank v. Thompson*, 7 Smedes & M. 443; *Bank of Md. v. Ruff*, 7 Gill & J. 443; *Bank of Penn'a v. Spangler*, 32 Pa. St. 474; and see *Blount v. Windley*, 68 No. Car. 1. But compare *Farmers' Bank v. Willis*, 7 W. Va. 31; *Hallowell etc. Bank v. Howard*, 13 Mass. 235; *Matter of White Mts. Bank*, 46 N. H. 143.

14 *American Bank v. Wall*, 56 Me. 167; *Thorp v. Wegefardth*, 56 Pa. St. 82; *Exchange Bank v. Knox*, 19 Gratt. 739; *Clarke v. Hawkins*, 5 Ill. 1. 219.

15 *Diven v. Phelps*, 34 Barb. 224; *Robinson v. Bank of Darien*, 18 Ga. 63; *American Bank v. Wall*, 56 Me. 167; *Tillon v. Britton*, 4 Halst. 120. Compare *Abbott v. Agr. Bank*, 11 Smedes & M. 405.

16 See *Nashville Bank v. Henderson*, 5 Yerg. 104; *Thurston v. Wolfborough Bank*, 18 N. H. 391; *Bryant v. Damariscotta Bank*, 18 Me. 240.

17 *Nat. Bank etc. v. Wash. County Nat. Bank*, 5 Hun, 605; *Crawford v. Bank of Wilmington*, Phill. (N. C.) 136; *Thurston v. Wolfborough Bank*, 18 N. H. 391. If a bank-note is payable on demand, at a particular time and place, a demand at the specified place is necessary, and at the specified time or afterward: *Dougherty v. Western Bank*, 13 Ga. 287. Compare *Ware v. Street*, 2 Head, 609; *Haxtun v. Bishop*, 3 Wend. 13; *State Bank v. Van Horn*, 1 South. 382.

18 Reapers' Bank v. Willard, 24 Ill. 433; Suffolk Bank v. Lincoln Bank, 3 Mason, 1.

19 Est. of Bank of Penn'a, 60 Pa. St. 471; and see Bank v. Thornberry, 3 B. Mon. 519.

20 Samples v. Bank, 1 Wood, 523. See Hinsdale v. Larned, 16 Mass. 64, 70.

21 Suffolk Bank v. Lincoln Bank, 3 Mason, 1.

22 Reapers' Bank v. Willard, 24 Ill. 433; and see Boatmen's etc. Inst. v. Bank of Mo. 33 Mo. 497; Hubbard v. Cheuango Bank, 8 Cowen, 68.

23 Third Nat. Bank v. Allen, 59 Mo. 310; Bank of U. S. v. Bank of Ga. 10 Wheat. 333.

24 Salem Bank v. Gloucester Bank, 17 Mass. 1; Gloucester Bank v. Salem Bank, 17 id. 33.

25 City Bank v. Farmers' etc. Bank, Taney, 119; Olmstead v. Winsted Bank, 32 Conn. 278; Raphael v. Bank of England, 17 Com. B. 161.

26 Hagerstown Bank v. Adams' Ex. Co. 45 Pa. St. 419; Bank of Louisville v. Summers, 14 B. Mon. 306; Bank of Mobile v. Meagher, 33 Ala. 622; Tower v. Appleton Bank, 3 Allen, 387; Irwin v. Planters' Bank, 1 Humph. 145.

27 Com. Bank v. Benedict, 18 B. Mon. 307; United States Bank v. Gill, 3 Conn. 106; Allen v. State, 1 Dev. & B. Ch. 3. Compare Mayor v. Johnson, 3 Camp. 324; Redmayne v. Burton, 2 L. T. N. S. 324.

28 Hinsdale v. Bank of Orange, 6 Wend. 378; Bank of Va. v. Ward, 6 Munf. 166; Martin v. Bank of U. S. 4 Wash. C. C. 253.

29 See Third Nat. Bank v. Allen, 59 Mo. 310; Cabot Bank v. Morton, 4 Gray, 156; Coffin v. Anderson, 4 Blackf. 395.

30 See Boyden v. Bank of Cape Fear, 65 No. Car. 13; Bank of Republic v. Millard, 10 Wall. 152.

31 Bank of U. S. v. Bank of Ga. 10 Wheat. 333. Third Nat. Bank v. Allen, 59 Mo. 310.

32 Abrahams v. Southw. R. R. Bank, 1 Rich. N. S. 441.

33 Abrahams v. Southw. R. R. Bank, 1 Rich. N. S. 441. Compare Cutting v. Marlor, 78 N. Y. 454; Foster v. Essex Bank, 17 M. s. 479; Scott v. Bank of Cherry Valley, 12 Pa. St. 471; Giblin v. McMullen, Law R. 2 P. C. 318.

§ 227. Bank-books.—It is the prevalent custom for every depositor with a bank to have a bank-book, and to present it at the bank counter when a deposit is made, in order to have the amount and date of the deposit entered therein by the bank teller or clerk.¹ Such entry is *prima facie* evidence that the bank received the amount, and casts on it the burden of showing that the entry is a mistake.² If, however, the bank clearly shows this, it is no longer bound by the entry.³ Nor is a depositor bound by an erroneous entry.⁴ If he can afterward prove a mistake in the entry, there is a remedy, as in ordinary cases of mistake;⁵ and this, notwithstanding a by-law or rule

of the bank requiring payments made and received to be examined at the time.⁶ A dispute between the depositor and bank, as to the correctness of the entry, raises a question of fact for the jury.⁷ A depositor owes no duty to a bank which requires him to examine his bank-book or vouchers, with a view to the detection of forgeries of his name.⁸ He has a right to assume that the bank, before paying his checks, will ascertain the genuineness of his signature.⁹

1 See *Sullivan v. Lewiston Inst. for Savings*, 56 Me. 507; *Schoenwald v. Metrop. Sav. Bank*, 57 N. Y. 418; *post*, § 229.

2 *Asher v. Park Bank*, 7 Alb. L. J. 43; *Shaw v. Dartnall*, 6 Barn. & C. 57; *Commercial Bank v. Rhind*, 1 Macq. 643.

3 *Shaw v. Ploton*, 4 Barn. & C. 715.

4 *Mechanics' etc. Bank v. Smith*, 19 Johns. 115; and see *Godin v. Bank of Commonw.* 6 Duer, 76.

5 *Mechanics' etc. Bank v. Smith*, 19 Johns. 115; and see *First Nat. Bank v. Haight*, 55 Ill. 191.

6 *Mechanics' etc. Bank v. Smith*, 19 Johns. 115; and compare *Gallatin v. Bradford*, 1 Bibb, 209; *Seneca County Bank v. Lamb*, 26 Barb. 595.

7 *Snead v. Williams*, 9 L. T. N. S. 115.

8 *Weisser v. Denison*, 10 N. Y. 68.

9 *Welsh v. German American Bank*, 73 N. Y. 424; *Salt Springs Bank v. Syracuse Sav. Inst.* 62 Barb. 101; and see § 224, *ante*. That a depositor has a right to inspect the books of the bank on proper occasions: see *Union Bank v. Kuapp*, 3 Pick 96. Compare *Hardy v. Veasey*, Law R. 3 Ex. 107.

§ 228. Usages and customs.—Reasonable and established usages and customs of banks enter into and constitute a part of contract made with them, and must have due weight in expounding such contracts;¹ but the usage or custom must be so far known to the party to be affected by it, as to render it probable that the contract was made with reference to it.² To give a usage of a bank the force of law requires an acquiescence and notoriety, from which an inference may be drawn that it is known to the public, and especially to those who do business at the bank.³ Banking usages will not be judicially noticed by the courts, but must be proved,⁴ excepting, perhaps, the usage of "banking hours."⁵ But the usage of banks generally, or of an individual bank, may be

proved by parol testimony;⁶ and any witnesses who actually know of the existence of the usage, as a matter of fact, are competent to testify to it.⁷ A single case, though insufficient to establish a general usage of a bank,⁸ is, if known to persons dealing with the bank, sufficient notice to them of the existence of a usage already established.⁹ But the custom of a bank to take notes signed by the promisors, without a distinction thereon as to who is principal and who surety, will not bind a surety, known by the bank to be such, after it has extended the time of payment without the surety's consent, although the surety had knowledge of the custom.¹⁰ A by-law is neither a usage, nor proof of one,¹¹ and cannot affect the rights or interest of third persons.¹² Hence, a by-law of a bank, which provides that payments made and received must be examined at the time, does not prevent a party dealing with the bank from afterward showing a mistake in his account.¹³ And a custom of banks not to correct mistakes in the receipt or payment of money, unless discovered before the party leaves the room, is held to be illegal and void.¹⁴ So of a custom to pay only half of a half bank-note.¹⁵ The usage of the bank's notary is not to be deemed the usage of the bank;¹⁶ and the usage by a bank teller to issue certificates of deposit is not proof of a usage to certify checks.¹⁷ The custom of a bank is no evidence to establish a contract where an express agreement would be necessary;¹⁸ but it may be proved for the purpose of interpreting the contract.¹⁹

1 *Smith v. Whiting*, 12 Mass. 6; *Neiffer v. Bank of Nashville*, 1 Head, 162; *Curtis v. Leavitt*, 15 N. Y. 9, 168; *Hartford Bank v. Stedman*, 3 Conn. 489; *Warren Bank v. Suffolk Bank*, 10 Cush. 582.

2 *Pierce v. Butler*, 14 Mass. 303; *Wells v. Bailey*, 49 N. Y. 464; 10 Am. R. 407; *Slippery v. Stewart*, 50 Barb. 62; *Farmers' etc. Nat. Bank v. Sprague*, 52 N. Y. 605; *Mills v. Bank of U. S.* 11 Wheat. 431.

3 *Adams v. Otterback*, 15 How. 539, 545; and see *Marine Bank of Chicago v. Rushmore*, 28 Ill. 463.

4 *Planters' Bank v. Farmers' etc. Bank*, 8 Gill & J. 449. Compare *Citizens' Bank v. Grafflin*, 31 Md. 507.

5 See *Hare v. Henty*, 10 Com. B. N. S. 65; *Parter v. Gordon*, 7 East, 389; *Salt Springs etc. Bank v. Burton*, 58 N. Y. 430.

- 6 *Mills v. Bank of U. S.* 11 Wheat. 431; *Renner v. Bank of Columbia*, 9 Id. 581.
- 7 *Griffin v. Rice*, 1 Hilt. 184.
- 8 *Duval v. Farmers' Bank*, 9 Gill & J. 31.
- 9 *Dorchester etc. Bank v. New England Bank*, 1 Cush. 177.
- 10 *Line Rock Bank v. Mallett*, 42 Me. 349.
- 11 *Piscataqua Exchange Bank v. Carter*, 20 N. H. 246; *Central Bank v. Davis*, 19 Pick. 373.
- 12 *Mechanics' etc. Bank v. Smith*, 19 Johns. 115; and see *Samuels v. Central etc. Exp. Co. McCahon*, 214.
- 13 *Mechanics' etc. Bank v. Smith*, 19 Johns. 115.
- 14 *Gallatin v. Bradford*, 1 Bibb, 209.
- 15 *Allen v. State Bank*, 1 Dev. & B. 3.
- 16 *Bank of Alexandria v. Deneale*, 2 Cranch C. C. 488.
- 17 *Mussey v. Eagle Bank*, 9 Metc. 306. Compare *Mechanics' Bank v. Butchers' etc. Bank*, 16 N. Y. 125.
- 18 *Harper v. Calhoun*, 8 Miss. 203; and see *Marine Bank of Chicago v. Chandler*, 27 Ill. 625.
- 19 *Jones v. Fales*, 4 Mass. 245.

§ 229. Savings banks.—The ordinary functions of a savings bank are to receive deposits of money, invest them for the security of the depositors, and repay them with interest.¹ Such an institution is said to be a general or public trustee, and as such, it is subject to the jurisdiction of the courts over trusts.² But it is held not to be a benevolent or charitable society within the meaning of a statute relating to such societies.³ It is unlawful for a savings bank to prosecute business as a bank of discount,⁴ without being expressly empowered by statute to do so.⁵ Savings banks having a capital stock, or which transact any other business than receiving deposits, to be loaned or invested for the depositor's sole benefit, may be taxed under the internal revenue laws.⁶ And the usual entry of a deposit in the pass-book of a depositor, or of a payment to him, is held to be a certificate of deposit, or a check or draft, and so liable to a tax imposed by law on deposits in banks.⁷ A depositor in a savings bank may maintain an action against the corporation to reclaim his deposits.⁸ And a trustee of a savings bank is liable at common law to the corporation for a misapplication of the funds of the bank;⁹ and a receiver can enforce such

liability.¹⁰ If part of the funds on deposit are lost, what remain belong to all the depositors proportionately.¹¹ A by-law, assented to by the depositors, that the pass-book of each shall be transferable to order, does not render such pass-book a negotiable instrument, and especially as to third parties.¹² But a certificate of deposit issued by a savings bank, and payable to the depositor or order, is a negotiable instrument.¹³ In making payments to persons who present a depositor's book, the bank is responsible only for the exercise of reasonable care and diligence;¹⁴ and if the officers of the bank, using such care and diligence, make a payment upon presentation of a book by one apparently in the lawful possession of it, as owner, the true depositor is bound by the payment.¹⁵ A regulation that, on repayment of deposits, the pass-book shall be produced, is not unreasonable;¹⁶ subject, however, to the qualification that if the depositor makes proof of the loss or destruction of the book, he will be entitled to his money on demand.¹⁷ A mere temporary suspension of payment by a savings bank will not be deemed an absolute cause of forfeiture;¹⁸ but it is otherwise as to a fraudulent suspension of payment.¹⁹ Managers of a savings bank have no right to profits, as such.²⁰

1 West's Appeal, 64 Pa. St. 186; Bank for Savings v. Collector, 3 Wall. 495; and see Beaver v. McGrath, 50 Pa. St. 479.

2 Matter of Newark Sav. Inst. 28 N. J. Eq. 552.

3 West's Appeal, 64 Pa. St. 186; Snoren v. Mendenhall, 23 Minn. 92; and see People v. Nelson, 46 N. Y. 477.

4 Re Jaycox, 12 Blachf. 209; and see Pratt v. Short, 79 N. Y. 437.

5 See Pape v. Capitol Bank of Topeka, 20 Kan. 440.

6 Oulton v. Sav. Inst. 17 Wall. 109; and see Bank for Savings v. Collector, 3 Id. 495; Dollar Sav. Bank v. United States, 19 Id. 227.

7 Oulton v. Sav. Inst. 17 Wall. 109.

8 Jochumsen v. Suffolk Sav. Bank, 3 Allen, 87; and see Makin v. Sav. Inst. 23 Me. 350; Eaves v. People's Sav. Bank, 27 Conn. 229.

9 Van Dyck v. McQuade, 57 How. Pr. 62; and see Hun v. Cary, 52 N. Y. 65.

10 Van Dyck v. McQuade, 57 How. Pr. 62.

11 Bunnell v. Collinsville Sav. Soc. 38 Conn. 203.

12 Witte v. Vincenot, 43 Cal. 325; and see Stewart v. State, 43 Tex. 342.

13 Fells Point Sav. Inst. v. Weedon, 18 Md. 320.

14 *Hayden v. Brooklyn Sav. Bank*, 15 Abb. Pr. N. S. 297; *Sullivan v. Lewiston Inst. for Savings*, 56 Me. 207.

15 *Sullivan v. Lewiston Inst. for Savings*, 56 Me. 507; *Kelly v. Eml-grant etc. Sav. Bank*, 2 Daly, 227; *Schoenwald v. Metrop. Sav. Bank*, 57 N. Y. 418; *Levy v. Franklin Sav. Bank*, 117 Mass. 448. But compare *Appleby v. Erie County Sav. Bank*, 63 N. Y. 12. The gift of a savings bank book, with an intention to give the deposits, is a valid gift: *Tillinghast v. Wheaton*, 3 R. I. 536; 5 Am. R. 621; *Camp's Appeal*, 36 Conn. 68; 4 Am. R. 39.

16 *Warhus v. Bowery Sav. Bank*, 21 N. Y. 543.

17 *Warhus v. Bowery Sav. Bank*, 21 N. Y. 543. Compare *Heath v. Sav. Bank*, 46 N. H. 78; *Levy v. Franklin Sav. Bank*, 117 Mass. 448; *Wallace v. Lowell Inst. for Savings*, 7 Gray, 134.

18 *State v. La. Sav. Co.* 12 La. An. 563.

19 *State v. La. Sav. Co.* 12 La. An. 568.

20 *Huntington v. Sav. Bank*, 96 U. S. 388. Compare *Sav. Bank v. New London*, 20 Conn. 111.

§ 230. **Creation of national banks.**—Congress may by appropriate legislation establish a national currency; ¹ and to this end the creation of the national banking associations is authorized under the National Banking Law.² The states cannot exercise control over banks created under this law, nor in any way affect their operation, except to the extent that Congress may see proper to permit;³ and a state law which forbids the establishment of banking companies, without legislative authority, has no application to national banks created by act of Congress.⁴ So a bank existing under a special or a general state law may become a national banking association, under the provisions of the National Banking Act,⁵ without assent or permission from the state;⁶ and the state cannot afterward continue to exact a bonus imposed by the charter granted to the bank by the state legislature, for the exercise of the franchise.⁷ A national banking association may be formed by any number of persons not less than five.⁸ They must enter into articles of association to be signed by them, and filed in the office of the comptroller of the currency;⁹ and the certificate of the comptroller is conclusive as to the validity of the organization of such corporation.¹⁰

¹ *Veazie Bank v. Fenno*, 8 Wall. 533; *Thomp. Nat. B'k Cas.* 22; and see *Osborn v. Bank of U. S.* 9 Wheat. 738; *First Nat. Bank v. Lamb*, 57 Barb. 429.

- 2 *Yeasle Bank v. Fenno*, 8 Wall. 533; U. S. Rev. Stat. §§ 5133-5243.
- 3 *Farmers' etc. Nat. Bank v. Dearing*, 91 U. S. 29; *Rhoner v. First Nat. Bank*, 14 Hun, 126.
- 4 *Stetson v. City of Bangor*, 56 Me. 274; *Thomp. Nat. B'k Cas.* 530.
- 5 See U. S. Rev. Stat. §§ 5154, 5155; *State v. Phoenix Bank*, 34 Conn. 206; *Lockwood v. Mech. Nat. Bank*, 9 R. I. 306.
- 6 *Casey v. Galli*, 94 U. S. 673; *Thomp. Nat. B'k Cas.* 142.
- 7 *State v. Nat. Bank*, 33 Md. 75.
- 8 U. S. Rev. Stat. § 5133.
- 9 See U. S. Rev. Stat. §§ 5133-5135. Compare *Burrows v. Smith*, 10 N. Y. 550.
- 10 *Casey v. Galli*, 94 U. S. 673; *Thomp. Nat. B'k Cas.* 142; and see *Tapley v. Martin*, 116 Mass. 275; *Thomp. Nat. B'k Cas.* 611; *Thatcher v. West River Nat. Bank*, 19 Mich. 196.

§ 231. Powers of national banks.—From the date of the execution of its organization certificate, a national banking association becomes a body corporate, and as such, it has power to adopt and use a corporate seal; to have succession for the period of twenty years, unless sooner dissolved; to make contracts; to sue and be sued; to elect or appoint directors, and by its board of directors to appoint a president and other officers; to prescribe by-laws; and to exercise all such incidental powers as shall be necessary to carry on the business of banking.¹ It may buy the check of an individual drawn on another bank, whether payable to bearer or order;² and is authorized to purchase, at a discount, notes and bills of third persons which are perfect and available in the hands of the borrower, as well as the borrower's own paper.³ And, although national banks are impliedly prohibited from dealing in stocks,⁴ they may take stock in payment or compromise of a doubtful debt, if done in good faith, and with a view to convert the stock into money;⁵ and may take stock and bonds as collateral security for a loan.⁶ In the latter case, the bank assumes the position of an ordinary bailee.⁷ But the taking of special deposits, to keep merely for the accommodation of the depositor, is not within the authority of national banks;⁸ and the executive and ministerial officers of such a bank cannot bind the corporation by contract for

such a bailment.⁹ A national bank cannot acquire a lien on its own stock held by persons who are its debtors;¹⁰ and a by-law which attempts to create such a lien is invalid.¹¹ Such a bank has power to purchase, hold, and convey real estate for certain purposes.¹² It may take real estate security for a previous loan,¹³ but not for a debt concurrently created, or for future advances.¹⁴ It may hold real estate actually purchased for security of a previous debt, although in excess thereof.¹⁵ But cannot "hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years."¹⁶ A national bank may take chattels,¹⁷ or a mortgage of chattels, as security for a pre-existing debt;¹⁸ and may sell any immovable it owns, and reserve a mortgage and vendor's privilege on it.¹⁹

¹ U. S. Rev. Stat. § 5136; and see *Shinkle v. First Nat. Bank*, 22 Ohio St. 516; *Shoemaker v. Nat. Mech. Bank*, 2 Abb. U. S. 416; *People's Bank v. Nat. Bank*, 101 U. S. 181.

² *First Nat. Bank of Rochester v. Harris*, 108 Mass. 514.

³ *Smith v. Exchange Bank of Pittsburg*, 26 Ohio St. 141; but see *Farmers' etc. Bank v. Baldwin*, 23 Minn. 198; *First Nat. Bank v. Piereson*, 16 Alb. L. J. 319; *Thomp. Nat. Bank Cas.* 637; 24 Minn. 140; 31 Am. R. 341.

⁴ *First Nat. Bank v. First Nat. Ex. Bank*, 92 U. S. 122; and see *Weckler v. First Nat. Bank*, 43 Md. 581; *First Nat. Bank v. Nat. Ex. Bank*, 39 Id. 600. Compare *Van Leuven v. First Nat. Bank*, 54 N. Y. 671; *Thomp. Nat. Bank Cas.* 724.

⁵ *First Nat. Bank v. Nat. Ex. Bank*, 92 U. S. 122.

⁶ *Canfield v. State Nat. Bank*, *Thomp. Nat. Bank Cas.* 312; 1 Northw. Rep. 173; *Third Nat. Bank v. Boyd*, 44 Md. 47; *Shoemaker v. Nat. Mech. Bank*, 2 Abb. U. S. 416.

⁷ *Third Nat. Bank v. Boyd*, 44 Md. 47; *Dearborn v. Union Nat. Bank*, 61 Me. 369; and compare *De Haven v. Kensington Nat. Bank*, 81 Pa. St. 95; *Thomp. Nat. Bank Cas.* 882.

⁸ *Wiley v. First Nat. Bank*, 47 Vt. 546; *Thomp. Nat. Bank Cas.* 905; but see *Pattison v. Syracuse Nat. Bank*, 17 Hun. 419; S. C. 80 N. Y. 82; *Lancaster Nat. Bank v. Smith*, 62 Pa. St. 48.

⁹ *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278; *Wiley v. First Nat. Bank*, 47 Vt. 546; but compare *First Nat. Bank v. Graham*, 79 Pa. St. 106; *White v. Commonw. Nat. Bank*, 4 Brewst. 234; *Chattahoochee Nat. Bank v. Schley*, 53 Ga. 369; *Leach v. Hale*, 31 Iowa. 69; *Hay v. Bank of Ky.* 10 Bush. 344; *Cutting v. Marlon*, 6 Abb. N. C. 388; 57 How. Pr. 56.

¹⁰ *Bullard v. Bank*, 18 Wall. 589; *Bank v. Lanier*, 11 Id. 369; *Conklin v. Second Nat. Bank*, 45 N. Y. 655. Compare *Young v. Vough*, 23 N. J. Eq. 325; *Re Dunkerson*, 4 Biss. 237.

- 11 *Evansville Nat. Bank v. Metrop. Nat. Bank*, 2 Bias. 527.
- 12 U. S. Rev. Stat. § 5137.
- 13 *Woods v. People's Nat. Bank*, 83 Pa. St. 57; *Merch. Nat. Bank v. Mears*, Thomp. Nat. Bank Cas. 333; *Ornn v. Nat. Bank*, 16 Kan. 341.
- 14 *Allen v. First Nat. Bank*, 23 Ohio St. 57; *Matthews v. Skinker*, 62 Mo. 323; *Kansas Valley Nat. Bank v. Rowell*, 2 Dill, 371; *Crocker v. Wultney*, 71 N. Y. 181. But it is now determined that a mortgage so taken is not void, but may be enforced, the penalty for violation of the statute being enforceable only by the government by a revocation of the bank's charter: *Union Nat. Bank v. Matthews*, 98 U. S. 621; reversing *Matthew v. Skinker*, 62 Mo. 323; *National Bank v. Whitney*, 103 U. S. 93; *First Nat. Bank v. Elmore*, 52 Iowa, 541; *Wroten v. Armat*, 31 Gratt. 233; *Thornton v. Nat. Exchange Bank*, 71 Mo. 221.
- 15 *Upton v. Nat. Bank*, 129 Mass. 153.
- 16 U. S. Rev. Stat. § 5137.
- 17 *Pittsburg etc. Works v. State Nat. B'k*, Thomp. Nat. Bank. Cas. 315.
- 18 *Spafford v. First Nat. Bank*, 37 Iowa, 181.
- 19 *New Orleans Nat. Bank v. Raymond*, 29 La. An. 355.

§ 232. **Liabilities of national banks.**—Whether or not national banks have power to take special deposits for safe keeping,¹ they are not liable for a loss of them unless they have been guilty of gross negligence.² If the owner of merchandise intrusts it to the bank for shipment and sale, the bank is liable to him for the proceeds, although it is not within the general powers of national banks to sell produce on commission.³ So if a national bank engages to hold a deposit as collateral security for the faithful performance of a contract by the depositor with a third person, such third person may recover against the bank for the depositor's non-performance.⁴ When a state bank reorganizes as a national bank, under the National Banking Law, it does not relieve itself from any former liabilities by the change.⁵ And where a state bank was robbed, and the cashier offered a reward for the detection of the thieves, and the bank afterward became a national bank, suit against it for the reward was sustained.⁶ National banks constitute no part of the government, and the fact that the comptroller of the currency has supervisory powers over them does not involve the federal government in any liability for their acts.⁷ An undertaking by an individual touching the organization of a national bank is not binding on the bank in its corporate capacity, unless it in some way adopts the contract, after organization.⁸

1 See § 231, *ante*; *Wiley v. First Nat. Bank*, 47 Vt. 546; *Pattison v. Syracuse Nat. Bank*, 80 N. Y. 82.

2 *Chattahoochee Nat. Bank v. Schley*, 58 Ga. 369; *De Haven v. Kensington Nat. Bank*, 81 Pa. St. 95; *Smith v. First Nat. Bank*, 99 Mass. 693; *Pattison v. Syracuse Nat. Bank*, 17 Hun. 419; *Pattison v. Syracuse Nat. Bank*, 22 Alb. L. J. 506; *First Nat. Bank v. Graham*, 100 U. S. 699; *Aff'g S. C.* 79 Pa. St. 103; 21 Am. R. 49.

3 *First Nat. Bank v. Priest*, 50 Ill. 321; and see *German Nat. Bank v. Meadowcroft*, 95 Id. 124; 35 Am. R. 137.

4 *Bushnell v. Chautauqua Co. Nat. Bank*, 10 Hun. 378; and see *Yerkes v. Nat. Bank*, 69 N. Y. 383; 25 Am. R. 208. But compare *First Nat. Bank v. Citizen's Bank*, 21 Int. Rev. Rec. 382.

5 *Coffey v. National Bank*, 43 Mo. 140; 2 Am. R. 489; *Thorp v. Wegeforth*, 56 Pa. St. 82; and see *Maynard v. Bank*, 7 Phila. 6.

6 *Kelsey v. Nat. Bank of Crawford*, 69 Pa. St. 426; *Thomp. Nat. Bank*, Cal. 647.

7 *Branch v. United States*, 12 Ct. of Cl. 281. Compare *National Bank v. Commonw.* 9 Wall. 353.

8 *McDonough v. First Nat. Bank*, 34 Tex. 303.

§ 233. **Taxation.**—The provision of the National Banking Act,¹ relative to the taxation of national banks, does not curtail the power of the state legislatures to exempt certain kinds of property from taxation.² The intention of the provision is to prevent unfriendly discrimination against national banks.³ In general, the capital of a bank is liable to taxation, unless specially exempted.⁴ But Congress has limited the states to taxation upon the shares in national banks, as distinguished from taxation of the banks, *eo nomine*, upon their property or capital.⁵ The shareholders in such a bank may be taxed by the states on stock or shares held by them, although all the capital of the bank be invested in federal securities;⁶ provided the taxation does not exceed the rate imposed upon the shares of state banks where the national bank is located.⁷ Every state within which a national bank is located has jurisdiction, for the purposes of taxation, of all the shareholders of the bank, whether resident or non-resident.⁸ And the tax must be levied at the place where the bank is located, without respect to the domicile of the shareholders.⁹ A state may lawfully enact that the tax upon shares of a national bank shall be paid by the bank;¹⁰ in which case, the tax may be enforced by suit or by distress against the property of the bank.¹¹ But in the absence of such enactment, the

collector has no authority to enforce collection against the property of the bank, or of the shareholders, except that of the delinquent.¹² And the personal property of a national bank, such as safes, office furniture, etc., is not subject to taxation by the state.¹³ A state statute which permits any debtor, assessed upon personal property, to deduct the amount of his debts from the valuation of all his personal property, including money capital, except bank shares,¹⁴ is unconstitutional and invalid as to national bank shares,¹⁵ and affords no authority for making any assessment upon such shares.¹⁶ Such a statute is invalid, inasmuch as it operates to tax shares in national banks at a higher rate than other money capital.¹⁷ Without authority conferred by a statute of the state, officers of a municipal corporation have no power to levy a tax on shares of stock in a national bank.¹⁸ And it has been held that the circulating notes of a national bank are not liable to state taxation.¹⁹ A national bank holds a trust relation to the body of stockholders,²⁰ and it may maintain a suit in equity to restrain the enforcement of an illegal tax upon its shares.²¹ In order to determine the taxable value of shares of national banks, a state may authorize their appraisement at their current market value, at the place where the bank is located.²²

1 See U. S. Rev. Stat. § 5219.

2 *Adams v. Nashville*, 95 U. S. 19; *Thomp. Nat. Bank Cas.* 148; 16 Alb. L. J. 416.

3 *Adams v. Nashville*, 95 U. S. 19; and see *People v. Comm'rs*, 4 Wall. 244; *City of Richmond v. Scott*, 48 Ind. 568; *Frazer v. Stebern*, 16 Ohio St. 614.

4 *New Orleans v. People's Bank*, 27 La. An. 646.

5 *St. Louis Nat. Bank v. Papin*, *Thomp. Nat. Bank Cas.* 326. Compare *Frederick County v. Frederick Farmers' etc. Bank*, 48 Md. 117; *Collins v. Chicago*, 4 Bliss. 472; *Nat. Com. Bank etc. v. Mayor etc.* 62 Ala. 284; 34 Am. R. 15; *Sumter County v. Nat. Bank*, 62 Ala. 464; 34 Am. R. 30.

6 *National Bank v. Commonw.* 9 Wall. 353.

7 *National Bank v. Commonw.* 9 Wall. 353; and see *Stetson v. Bangor*, 56 Me. 274; *Collins v. Chicago*, 4 Bliss. 472; *People v. Weaver*, 100 U. S. 539.

8 *Tappan v. Merch. Nat. Bank*, 19 Wall. 490.

9 *Baker v. First Nat. Bank*, 67 Ill. 297; *Union Nat. Bank v. Chicago*,

3 Biss. 82. Compare *Flint v. Boston*, 99 Mass. 141; *First Nat. Bank v. Smith*, 66 Ill. 44; *Kyle v. Mayor etc.* 75 No. Car. 445.

10 *First Nat. Bank v. Douglas County*, 3 Dill. 330.

11 *First Nat. Bank v. Douglas County*, 3 Dill. 330.

12 *Nat. Bank v. Elmira*, 51 N. Y. 49; *Hershire v. First Nat. Bank*, 35 Iowa, 272; *First Nat. Bank v. Meredith*, 44 Mo. 500.

13 *Nat. State Bank v. Young*, 25 Iowa, 311.

14 See Laws of N. Y. 1868, ch. 761; *People v. Dolan*, 36 N. Y. 59; *People v. Comm'rs etc.* 69 Id. 91.

15 *People v. Weaver*, 100 U. S. 539; *Browne's Nat. Bank Cas.* 57; *Nat. Ex. Bank v. Hills*, 22 Alb. L. J. 451.

16 *Nat. Ex. Bank v. Hills*, 22 Alb. L. J. 451.

17 *People v. Weaver*, 100 U. S. 539; *Browne's Nat. Bank Cas.* 57; and see *Frazer v. Siebern*, 18 Ohio St. 614.

18 *Stetson v. Bangor*, 56 Me. 274; and see *Craft v. Tuttle*, 27 Ind. 332; *Nat. Bank v. Mayor etc.* 8 Helsk. 814; *Mayor etc. v. Macon Nat. Bank*, 59 Ga. 648.

19 *Horne v. Green*, 52 Miss. 452. But compare *Comm'rs v. Elston*, 32 Ind. 27; *Lilly v. Comm'rs etc.* 69 No. Car. 300.

20 *Cummings v. Nat. Bank*, 101 U. S. 153, 157.

21 *Nat. Ex. Bank v. Hills*, 22 Alb. L. J. 451; *City Nat. Bank v. Paducah*, *Thomp. Nat. Bank Cas.* 300; 5 Cent. L. J. 347. See *First Nat. Bank v. Hershire*, 31 Iowa, 18.

22 *People v. Comm'rs etc.* 94 U. S. 415; *Hepburn v. School Directors*, 23 Wall. 430; *City of Richmond v. Scott*, 48 Ind. 568.

§ 234. **Citizenship.**—A national bank is to be regarded as located in the place specified in its certificate of organization,¹ and is a citizen of the state wherein it is located.² It may, therefore, insist upon the removal of a suit on its behalf, from a state to a federal court.³ State courts have jurisdiction of suits brought by a national bank;⁴ and it may be sued in the courts of the state in which it is located.⁵ And it has been held, that an action will lie against such bank only in the city or county in which the bank is located.⁶ Other decisions, however, hold that national banks doing business in one state may be sued in the courts of another state.⁷ A national bank was held to be a foreign corporation within a statute requiring corporations created by "the laws of any other state or country" to give security for costs.⁸

1 *Manuf. Nat. Bank v. Baack*, 2 Abb. U. S. 222; 8 Blatchf. 137.

2 *Davis v. Cook*, 9 Nev. 174. Compare *Malu v. Second Nat. Bank*, 6 Biss. 26; *Nat. Park Bank v. Nichols*, 4 Id. 315.

3 *Davis v. Cook*, 9 Nev. 134; *Chatham Bank v. Merch. Nat. Bank*, 4 *Thomp. & C.* 156.

4 *First Nat. Bank v. Hubbard*, 49 Vt. 1.

5 *Adams v. Dannis*, 29 La. An. 315; and see *Ordway v. Cent. Nat. Bank*, *Thomp. Nat. Bank Cas.* 559; 47 Md. 217; 28 Am. R. 455.

6 *Crocker v. Marine Nat. Bank*, 101 Mass. 240; and see *Cadle v. Tracy*, 11 Blatchf. 101; *Bank of Bethel v. Paticajolque Bank*, 14 Wall. 383; *Chesapeake Bank v. First Nat. Bank*, 40 Md. 269.

7 *Cooke v. State Nat. Bank*, 52 N. Y. 96; 3 Abb. Pr. N. S. 339; *Robinson v. Nat. Bank etc.* 81 N. Y. 385; and see *Adams v. Dannis*, 29 La. An. 315.

8 *Nat. Park Bank v. Gunst*, 1 Abb. N. C. 292.

§ 235. Interest on loans.—National banks may charge the rate of interest fixed by state laws for lenders generally,¹ and may take a higher rate, if state banks of issue are permitted by the laws of the state to reserve more.² If no rate of interest is defined by the laws of the state wherein the national bank is located, seven per cent is allowed to be charged.³ And this rule applies to loans made by national banks to corporations where the statute laws of the state expressly forbids a corporation to interpose the defense of usury.⁴ Where, by the statute law of a state, parties are allowed to contract for a usurious rate of interest, evidenced by a memorandum in writing, signed by the party to be charged, a national bank located in the state may discount notes, charging usurious interest in advance, without other memorandum than the notes.⁵ But a national bank is not justified in taking the rate of interest allowed by special statutes of a state, to a few banks of issue, where such rate is higher than that allowed to banks of issue generally.⁶ The only penalty incurred by national banks for taking excessive interest, is that imposed by the National Banking Act;⁷ namely, the forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon,⁸ and liability to action to recover back double the amount of interest paid.⁹ The penalty is not limited to cases where the note, etc., upon its face, carries interest with it;¹⁰ but the moment usurious interest is "taken, received, or charged," the forfeiture is established.¹¹ And any party to the transaction may avail himself of it, if payment is

sought to be enforced against him.¹² And in an action by a national bank, on paper discounted by it, the defendant may set off the amount of usurious discounts on other transactions.¹³ In giving penalty of twice the amount of interest paid, the usurious interest only is doubled, and not the amount of the entire interest.¹⁴ The action to recover the penalty must be commenced within two years from the time the usurious transaction occurred;¹⁵ and where the two years have elapsed, the right to offset the usurious interest against any claim of the bank is also barred.¹⁶ But it has been held that the usuriousness of the transaction is not determined, and the two years do not begin to run, until the principal has been paid, or a judgment entered for the full amount thereof.¹⁷ A state court has jurisdiction of an action against a national bank to recover the penalty for exacting unlawful interest.¹⁸ But the courts of one state have no jurisdiction of such an action against a national bank located in another state.¹⁹ It has been held that the remedy by "forfeiture of the entire interest," for exacting unlawful interest, can only be had by way of defense to an action on the note, or to recover the loan, and no action lies for it.²⁰ But where illegal interest has been paid, it cannot be set up by way of counter-claim, or set-off, that the bank knowingly took a greater rate of interest than that allowed by law, and the proper remedy in such case is an action of debt to recover back twice the amount.²¹

1 *Tiffany v. Nat. Bank of Mo.* 18 Wall. 409. Compare *Shunk v. First Nat. Bank*, 22 Ohio St. 508.

2 *Tiffany v. Nat. Bank of Mo.* 18 Wall. 409; and see *Johnson v. Nat. Bank of Gloversville*, 74 N. Y. 329.

3 U. S. Rev. Stat. § 5197.

4 *In re Wild*, 11 Blatchf. 243. Compare *Rosa v. Butterfield*, 33 N. Y. 665; *First Nat. Bank v. Lamb*, 50 Id. 95.

5 *Newell v. Nat. Bank of Somerset*, 12 Bush, 57. Compare *Wiley v. Starbuck*, 44 Ind. 986.

6 *Duncan v. First Nat. Bank*, *Thomp. Nat. Bank Cas.* 360; 11 *Bank. Mag.* 787.

7 See U. S. Rev. Stat. § 5198; *Farmers' etc. Nat. Bank v. Dearing*, 91 U. S. 29; *Wiley v. Starbuck*, 44 Ind. 298.

8 U. S. Rev. Stat. § 5198. See *Nat. Bank v. Lewis*, 81 N. Y. 15.

9 U. S. Rev. Stat. § 5198; *Nat. Ex. Bank v. Moore*, 2 Bond, 170. No loss of the entire debt is incurred by the bank, as a penalty or otherwise, by reason of the provisions of the usury law of a state: *Farmers' etc. Nat. Bank v. Dearing*, 91 U. S. 29; and see *First Nat. Bank v. Garl'ghouse*, 22 Ohio St. 432; *Wiley v. Starbuck*, 44 Ind. 288; *Merchants' etc. Nat. Bank v. Myers*, 74 No. Car. 314; *Cheek v. Merch. Nat. Bank*, 10 Heisk. 618; *Davis v. Randall*, 115 Mass. 547; *Hintermister v. First Nat. Bank*, 84 N. Y. 212; overruling *First Nat. Bank v. Lamb*, 50 id. 95. And a bill in equity will not lie to recover usury from a national bank: *Hambright v. Nat. Bank*, 3 Lea, (Tenn.) 40; 31 Am. R. 629; *Barnet v. Nat. Bank*, 98 U. S. 555.

10 *National Bank v. Lewis*, 75 N. Y. 516.

11 *National Bank v. Lewis*, 75 N. Y. 516.

12 See *Smith v. Exchange Bank of Pittsburg*, 26 Ohio St. 141; *Bank of Cadiz v. Sleminons*, 34 id. 142; 32 Am. R. 334; *Hintermister v. First Nat. Bank*, 64 N. Y. 212; *Nat. Bank v. Lewis*, 75 id. 516.

13 *Lucas v. Government Nat. Bank*, 78 Pa. St. 228. Compare *Overholt v. National Bank*, 82 id. 490.

14 *Hintermister v. First Nat. Bank*, 64 N. Y. 212; *Brown v. Second Nat. Bank*, 72 Pa. St. 209. But see *contra*, *Crocker v. First Nat. Bank*, *Thomp. Nat. Bank Cas.* 317; *National Bank v. Davis*, id. 350; 6 Cent. L. J. 106. The taint of usury follows through a series of renewal notes, and the bank forfeits all the interest paid on the whole series: *Cake v. Lebanon First Nat. Bank*, 86 Pa. St. 303; and see *Bank of Cadiz v. Sleminons*, 34 Ohio St. 142; 32 Am. R. 364.

15 U. S. Rev. Stat. § 5198.

16 *National State Bank v. Boylan*, 2 Abb. N. C. 216; *Shinkle v. First Nat. Bank*, 22 Ohio St. 516; *Higby v. First Nat. Bank*, 26 id. 75; and see *Overholt v. National Bank*, 82 Pa. St. 209; *Orlway v. Cent. Nat. Bank*, *Thomp. Nat. Bank Cas.* 559; 47 Md. 217. But compare *Pickett v. Merch. Nat. Bank*, 32 Ark. 346.

17 *Duncan v. First Nat. Bank*, *Thomp. Nat. Bank Cas.* 360; 11 Bank. Mag. 787.

18 *Bletz v. Columbia Nat. Bank*, 87 Pa. St. 87; 30 Am. R. 343; *Ordway v. Cent. Nat. Bank*, 47 Md. 217; 28 Am. R. 455; *Thomp. Nat. Bank Cas.* 559; *Dow v. Ivasburgh Nat. Bank*, 50 Vt. 112; 38 Am. R. 493. But see *Newell v. Nat. Bank of Somerset*, 12 Bush, 57; *State v. Tuller*, 34 Conn. 280.

19 *Missouri Riv. Tel. Co. v. First Nat. Bank*, 74 Ill. 217; and see § 234, *ante*. But compare *Cooke v. State Nat. Bank*, 52 N. Y. 96.

20 *Brown v. Second Nat. Bank*, 72 Pa. St. 209.

21 *Hintermister v. First Nat. Bank*, 64 N. Y. 212; *Nat. Bank v. Lewis*, 81 id. 15; *Barnet v. Nat. Bank*, 98 U. S. 555. Compare *Nat. Bank v. Lewis*, 75 N. Y. 516.

§ 236. *Acts ultra vires*.—It is held to be *ultra vires* of a national bank to take special deposits to hold merely for the accommodation of the depositor;¹ or to buy promissory notes for speculation;² or to deal in stocks;³ or sell bonds of railroad companies on commission;⁴ or to take a mortgage upon real estate to secure future advances;⁵ or, it seems, to loan its credit and become an accommoda-

tion indorser of a promissory note.⁶ But loans made by a national bank to any person, in excess of one-tenth part of its capital stock, are not void;⁷ and in an action to recover such loans, the defendant cannot interpose the defense that they were in violation of the National Banking Act.⁸ So if a national bank enters into a contract which is *ultra vires*, it cannot afterward repudiate the contract and at the same time retain its fruits.⁹

1 Wiley v. First Nat. Bank, 47 Vt. 546; Thomp. Nat. Cas. 906. Compare § 231, *ante*.

2 First Nat. Bank v. Pierson, 16 Alb. L. J. 319; Thomp. Nat. Bank Cas. 637. But see Smith v. Exchange Bank of Pittsburg, 26 Ohio St. 141; Atlantic State Bank v. Savery, 18 Hun, 36; 23 Alb. L. J. 453; Nat. Pemberton Bank v. Porter, 125 Mass. 333; 28 Am. R. 235.

3 First Nat. Bank v. Nat. Ex. Bank, 92 U. S. 122.

4 Weckler v. First Nat. Bank, 42 Md. 581.

5 Woods v. People's Nat. Bank, 83 Pa. St. 57; Kansas Valley Nat. Bank v. Rowell, 2 Dill. 371.

6 National Bank v. Wells, 79 N. Y. 496.

7 Gold Min. Co. v. National Bank, 96 U. S. 640.

8 Gold Min. Co. v. National Bank, 96 U. S. 640; O'Hare v. Second Nat. Bank, 77 Pa. St. 96; Stewart v. Nat. Union Bank, 2 Abb. U. S. 424; Elder v. First Nat. Bank, 12 Kan. 238. Compare Allen v. First Nat. Bank, 23 Ohio St. 97.

9 Casey v. La Société etc. 2 Woods, 77; Thomp. Nat. Bank Cas. 235; and see tit. ULTRA VIRES.

§ 237. *Winding-up.*—The dissolution or winding-up of national banks can be enforced only in the mode provided by the National Banking Act.¹ But in cases not within the special provisions of that act, the bank may be proceeded against in the same manner as any other insolvent corporation.² And the provisions of that act do not preclude the appointment of a receiver in a judgment creditor's suit.³ A receiver appointed by the comptroller of the currency is held to be an officer of the United States;⁴ but he does not represent the government in such a way that, by suing the receiver and comptroller, a judgment may be obtained against it.⁵ The receiver properly represents the bank, its stockholders, and its creditors.⁶ He holds the same title to the assets of the bank that the bank held.⁷ He may sue for debts

due the bank either in his own name as receiver, or in the name of the bank;⁸ and he may sue for an ordinary debt without being instructed so to do by the comptroller.⁹ And the debtors, when sued, cannot inquire into the legality of the appointment of the plaintiff as receiver.¹⁰ But when it is sought to enforce the personal liability of the stockholders, suit for that purpose can be instituted by the receiver only, by direction of the comptroller.¹¹ The corporate existence of the bank is not dissolved by the appointment of a receiver;¹² and after his appointment, and while he is administering the affairs of the bank, a suit may be instituted against it in its corporate name.¹³ So an action may be prosecuted against a national banking association, although it has suspended active operations, and has voluntarily resolved to go into a state of liquidation.¹⁴

1 In re Manuf. Nat. Bank, 5 Biss. 499; Union Gold Min. Co. v. Rocky Mt. Nat. Bank, 1 Colo. 531.

2 Irons v. Manuf. Nat. Bank, 6 Biss. 301; Thomp. Nat. Bank Cas. 203.

3 Wright v. Merch. Nat. Bank; Thomp. Nat. Bank Cas. 321; 3 Cent. L. J. 351.

4 Platt v. Beach, 2 Ben. 303.

5 Case v. Terrell, 11 Wall. 199.

6 Case v. Terrell, 11 Wall. 199.

7 Casey v. La Societé etc. 2 Woods, 77; Thomp. Nat. Bank Cas. 235.

8 Casey v. Galli, 94 U. S. 673; Bank v. Kennedy, 17 Wall. 19.

9 Bank v. Kennedy, 17 Wall. 19.

10 Cadle v. Baker, 20 Wall. 650; Platt v. Beebe, 57 N. Y. 339; Platt v. Crawford, 8 Abb. Pr. N. S. 237.

11 Kennedy v. Gibson, 8 Wall. 496.

12 Bank of Bethel v. Pahquioque Bank, 14 Wall. 333; Green v. Walhill Nat. Bank, 7 Hun, 63.

13 Chemical Nat. Bank v. Bailey, 12 Blatchf. 490; Security Bank v. National Bank, 4 Sup. Ct. (T. & C.) 513.

14 Ordway v. Cent. Nat. Bank, 47 Md. 217; Thomp. Nat. Bank Cas. 569. See U. S. Rev. Stat. § 5220. Forfeiture of the privileges and powers of a national bank must be determined by a suit brought by the comptroller of the currency, and until determined it may do business: Stephens v. Monongahela Nat. Bank, 93 Pa. St. 157; 32 Am. R. 438.

CHAPTER XIX.

RAILROADS.

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§ 238. Nature of the franchise.—A railroad franchise may be conferred upon and be enjoyed by natural persons;¹ but it is usually conferred upon a corporation.²

So far as the stockholders are concerned, a railroad company is a private corporation;³ but as it respects the powers of the legislature to authorize the taking of private property for public use, it may be regarded as a *quasi* public corporation.⁴ In the grant of the franchise, there is an implied condition that it is held as a *quasi* public trust.⁵ A railroad is a public work to which the aid of the State may be properly given;⁶ and in this respect, there is no distinction made between a road built by private capital, and owned by individuals, and one owned by the public itself.⁷ Public utility is the consideration for the grant of prerogative franchises to railroad companies;⁸ and such a company must not exercise its franchises to promote another's monopoly.⁹ And if the grant to a railway is not exclusive in its terms, the legislature is not precluded from granting other charters to similar corporations, which may essentially interfere with the operations of the former;¹⁰ or, under the power of eminent domain, the legislature may even take one or more of the franchises of the former upon making due compensation.¹¹ It is held that the rule of strict construction should be applied to railroad charters,¹² and especially to a grant of the exclusive privilege.¹³ But a statute which provides that railroads shall afford equal terms and facilities for transportation to all does not preclude a railroad company from carrying on the express business itself, to the exclusion of all other parties.¹⁴ If a railroad company, in constructing its road, transcend the authority constitutionally conferred by the legislature, the road is a nuisance, for which the company may be held liable in damages.¹⁵ But a railroad authorized by the legislature, and lawfully constructed and operated in an authorized place, cannot be adjudged a nuisance.¹⁶ The franchise in a railroad is a mere easement, and cannot be sold or assigned without legislative authority;¹⁷ nor is it, in ordinary cases, subject to levy and sale under execution.¹⁸ The duration of a franchise must be deemed

fixed by the constitution in operation at the time of the grant, or by the terms of the grant itself.¹⁹

1 New York etc. R. R. Co. v. Forty-second St. R. R. Co. 32 How. Pr. 481; Bank of Middlebury v. Edgerton, 30 Vt. 182.

2 Denver etc. R. R. Co. v. Denver City Railw. Co. 2 Colo. 673; O'Connor v. Pittsburg, 18 Pa. St. 187; Franklin Bridge Co. v. Wood, 14 Ga. 80.

3 Stevens v. Rutland etc. R. R. Co. 29 Vt. 545; and see Ohio etc. R. R. Co. v. Ridge, 5 Blackf. 78; Alabama etc. R. R. Co. v. Kidd, 29 Ala. 221; Trustees etc. v. Auburn etc. Railw. 3 Hill, 567, 570; Petition of Mt. Wash. Road Co. 35 N. H. 164.

4 Stevens v. Rutland etc. R. R. Co. 29 Vt. 545; Stockton etc. R. R. Co. v. Stockton, 41 Cal. 147; Swan v. Williams, 2 Mich. 424; Bradley v. New York etc. R. R. Co. 21 Conn. 294.

5 Messenger v. Penn'a R. R. Co. 37 N. J. L. 531; S. C. 17 Am. R. 754. See Alkin v. Western R. R. Co. 20 N. Y. 370; State v. Burlington etc. R. R. Co. 25 Vt. 433.

6 Davidson v. County Comm'rs, 18 Minn. 482; Leavenworth County v. Miller, 7 Kan. 479; Stockton etc. R. R. Co. v. Stockton, 41 Cal. 147; Chicago etc. R. R. Co. v. Smith, 62 Ill. 288.

7 Gibson v. Mason, 5 Nev. 283; and see Donuher v. State, 8 Smedes & M. 649.

8 Messenger v. Penn'a R. R. Co. 36 N. J. L. 407; and see Erie Railw. Co. v. Union etc. Ex. Co. 35 Id. 249; Pruitt v. Railroad Co. 62 Mo. 527; Chicago etc. R. R. Co. v. People, 56 Ill. 265; Beekman v. Saratoga etc. R. R. Co. 3 Paige, 45.

9 Camblos v. Phila. etc. R. R. Co. 4 Brewst. 563; Sandford v. Railroad Co. 24 Pa. St. 376; New Eng. Ex. Co. v. Maine Cent. R. R. Co. 57 Me. 183; McDuffee v. Railroad Co. 82 N. H. 430; Andersen v. Phila. etc. R. R. Co. 68 Pa. St. 370.

10 Raritan etc. R. R. Co. v. Del. etc. Canal Co. 18 N. J. Eq. 546; Turupike Co. v. State, 3 Wall. 210; State v. Noyes, 47 Me. 189; Matter of Buffalo, 68 N. Y. 167; Baltimore etc. R. R. Co. 43 Md. 538.

11 Matter of Kerr, 42 Barb. 119; New York etc. R. R. Co. v. Boston etc. R. R. Co. 36 Conn. 186; and compare Little Miami etc. R. R. Co. v. Dayton, 23 Ohio St. 510; Matter of N. Y. etc. R. R. Co. 20 Hun, 201.

12 Newhall v. Galena etc. R. R. Co. 14 Ill. 273; and see Parker v. Great West. Railw. Co. 7 Man. & G. 253; 7 Scott N. R. 835; Wilmington etc. R. R. Co. v. Reid, 64 No. Car. 228; Bowling Green etc. R. R. Co. v. Warren Co. Court, 10 Bush, 711.

13 Richmond R. R. Co. v. Louisa R. R. Co. 13 How. 71.

14 Sargent v. Boston etc. R. R. Co. 115 Mass. 418.

15 Mahon v. New York Cent. R. R. Co. 24 N. Y. 658; Commonw. v. Old Colony R. R. Co. 14 Gray, 93; McCandless' Appeal, 70 Pa. St. 210.

16 Easton v. N. Y. etc. R. R. Co. 24 N. J. Eq. 49; Parrot v. Cin. etc. R. R. Co. 10 Ohio St. 624.

17 Arthur v. Commercial etc. Bank, 9 Smedes & M. 394; and see Bardstown etc. R. R. Co. v. Metcalf, 4 Met. (Ky.) 139; Coe v. Columbus etc. R. R. Co. 10 Ohio St. 372; East Boston Freight R. R. Co. v. Eastern R. R. Co. 13 Allen, 422; Pullan v. Cin. etc. R. R. Co. 4 Biss. 35. But see Kennelbec etc. R. R. Co. v. Portland etc. R. R. Co. 59 Me. 23; Meyer v. Johnston, 53 Ala. 324.

18 Stewart v. Jones, 40 Mo. 140; Randolph v. Larned, 27 N. J. Eq. 557.

19 Atlantic etc. R. R. Co. v. Allen, 15 Fla. 637.

§ 239. **Organization.**—The organization of railroad companies is sometimes effected under the provisions of special charters;¹ but in many of the states such companies are now organized under general statutes enacted for the purpose.² In the latter case, the proceedings instituted to effect an organization do not constitute a legal body until all the requirements of the statute have been substantially complied with,³ and the articles filed in the office of the secretary of the state.⁴ But the legislative recognition of such company, after it has filed its certificate under the general law, heals any errors or informalities existing in the mode of its formation;⁵ and the company becomes, by such recognition, *ipso facto*, a legal corporation.⁶ Any irregularity in the proceedings to become organized should be deemed to be waived by such recognition.⁷ So if such company has become organized, and has acted as a corporation, it is estopped from denying its corporate existence, when sued upon a contract entered into as such corporation.⁸ Bad faith in obtaining the charter of a railroad company constitutes no ground for attacking it collaterally.⁹

1 See *Newhall v. Galena etc. R. R. Co.* 14 Ill. 273; *Burbop v. Milwaukee*, 21 Wis. 257; *Low v. Conn. etc. R. R. Co.* 48 N. H. 284; *Boston etc. R. R. Co. v. Salem etc. R. R. Co.* 2 Gray, 1; *Cleveland etc. R. R. Co. v. Speer*, 56 Pa. St. 323; *Weid v. London etc. Railw. Co.* 9 Jur. N. S. 510.

2 See *Ill. etc. R. R. Co. v. Cook*, 29 Ill. 237; *Palmerville etc. R. R. Co. v. King*, 17 Ohio St. 534; *Cin. etc. R. R. Co. v. Cole*, 29 Id. 126; *Heaton v. Cin. etc. R. R. Co.* 13 Ind. 273. As to the formation of English railway companies: see *Stats.* 26 and 27 Vict. ch. 52; 27 and 28 Id. ch. 120, 121; *Scottish etc. Railw. Co. v. Stewart*, 3 Macq. H. L. Cas. 302; *Norris v. Cooper*, 3 H. L. Cas. 161; *York etc. Railw. Co. v. Reg.* 1 El. & B. 538.

3 *People v. Stockton etc. R. R. Co.* 45 Cal. 306; and see *People v. Chambers*, 42 Id. 201.

4 *State v. Bailey*, 19 Ind. 452; *Buffalo etc. R. R. Co. v. Hatch*, 20 N. Y. 157; *Burt v. Farrar*, 24 Barb. 513; *Rubey v. Shain*, 54 Mo. 207.

5 *State v. Hudson Tunnel R. R. Co.* 38 N. J. L. 548.

6 *Black River etc. R. R. Co. v. Barnard*, 31 Barb. 258.

7 *White v. Ross*, 4 Abb. Ct. App. 589; 15 Abb. Pr. 66; and see *In re N. Y. Elevated R. R. Co.* 70 N. Y. 327, 338; *Mead v. N. Y. etc. R. R. Co.* 45 Conn. 109; *Atlantic etc. R. R. Co. v. St. Louis*, 66 Mo. 223; *Balt. etc. R. R. Co. v. Supervisors*, 3 W. Va. 319; *Maltby v. North-western etc. R. R. Co.* 16 Md. 422.

8 *Callender v. Hudson etc. R. R. Co.* 11 Ohio St. 516.

9 *Garrett v. Dillsburg etc. R. R. Co.* 78 Pa. St. 463.

§ 240. Subscriptions to stock.—It is the settled rule of law in this country that when the act of incorporation requires the capital stock to be a certain amount, no assessment can be lawfully made on the share of any subscriber until the whole sum contemplated is subscribed.¹ But if the charter of a railroad company authorizes it to commence the construction of its road when a given number of shares are subscribed, the shares may be lawfully assessed when the subscriptions reach that number, though the whole number of shares remain undetermined.² A subscription reciting that a company has been formed under the General Railroad Act, and that the articles of association, with the necessary affidavits, have been duly filed, is conclusive evidence of incorporation against the subscriber.³ And generally, a voluntary subscription in aid of a proposed railroad, if accepted, and the road is completed in accordance with the conditions of the promise, becomes a valid and binding contract.⁴ But merely signing incomplete articles, in which a blank is left for the names of the directors, will not bind a subscriber.⁵ Conditions precedent should be complied with by the company, or the subscriber will be released from his obligation to pay.⁶ But if a substantial performance of the conditions is shown, it is sufficient.⁷ A material deviation from a proposed route of a railroad will invalidate the obligations of non-assenting subscribers to stock.⁸ But a subscription is not invalidated by an amendment to the charter changing the name of the road;⁹ nor is a railroad company excluded from the benefit of municipal subscriptions to its capital stock, because its charter authorizes it also to carry on another business in connection with its road.¹⁰ And if a railroad company has accepted and expended the money arising from municipal subscriptions of stock, it is estopped to deny that its charter authorized the company to take such subscriptions.¹¹ The rights arising upon subscriptions to stock are capable of assignment, and may be enforced by one

standing in the light of an assignee.¹² If a railroad company has authority under its charter to lease its road, the exercise of such authority will not release subscribers to the stock of the company from the payment of their subscriptions.¹³ And, as a general rule, changes or alterations in the organization or purposes of a railroad company, which are authorized or contemplated by the charter and by-laws, do not operate to release a subscriber to its stock from his subscription.¹⁴

1 Penobscot etc. R. R. Co. v. Dunn, 39 Me. 535; Old Town etc. R. R. Co. v. Veazie, 39 Id. 571; New Hampshire etc. R. R. Co. v. Johnson, 30 N. H. 390; Phila. etc. R. Co. v. Hickman, 23 Pa. St. 318; Shurtz v. Schoolcraft etc. R. R. Co. 9 Mich. 269; Stoneham Branch R. R. Co. v. Gould, 2 Gray, 277; and see Hughes v. Antietam Manuf. Co. 34 Md. 316; Galveston Hotel Co. v. Bolton, 46 Tex. 633.

2 Boston etc. R. R. Co. v. Wellington, 113 Mass. 79; and compare Penobscot R. R. Co. v. White, 41 Me. 512; Penobscot etc. R. R. Co. v. Bartlett, 12 Gray, 244; Watts v. Salter, 10 Conn. B. 477.

3 Black River etc. R. R. Co. v. Clarke, 25 N. Y. 203; and see Monroe v. Fort Wayne etc. R. R. Co. 23 Mich. 272; Montpelier etc. R. R. Co. v. Lauglon, 46 Vt. 254. But compare De Witt v. Hastings, 8 Jones & S. 463; 69 N. Y. 518.

4 Mich. etc. R. R. Co. v. Bacon, 33 Mich. 466. Compare Parker v. North. Cent. R. R. 33 Id. 23; Melvin v. Holtz, 52 N. H. 61; St. Paul etc. R. R. Co. v. Robbins, 23 Minn. 439.

5 Dutchess etc. R. R. Co. v. Mabbett, 58 N. Y. 397; and see Belfast etc. Railw. Co. v. Moore, 60 Me. 561; Reed v. Richmond St. R. R. Co. 50 Ind. 342.

6 Martin v. Pensacola etc. R. R. Co. 8 Fla. 370; and see Jewett v. Lawrenceburgh etc. R. R. Co. 10 Ind. 539; Cass v. Pittsburg etc. Railw. Co. 80 Pa. St. 31; Ridgefield etc. R. R. Co. v. Brush, 43 Conn. 86; Chapman v. Mad River etc. R. R. Co. 6 Ohio St. 119; Virginia etc. R. R. Co. v. Lyon County, 6 Nev. 63; Bucksport v. Brewer, 67 Me. 295.

7 Ogden v. Kirby, 79 Ill. 555; Courtwright v. Strickler, 37 Iowa, 382; Des Moines Valley R. R. Co. v. Graff, 27 Id. 99; and see Ashtabula etc. R. R. Co. v. Smith, 15 Ohio St. 328; Chamberlain v. Painesville etc. R. R. Co. 15 Id. 225; Belfast etc. R. R. Co. v. Brooks, 60 Me. 568; McMillan v. Maysville etc. R. R. Co. 15 B. Mon. 218; Berryman v. Cin. etc. R. R. Co. 14 Bush, 755.

8 North Car. R. R. Co. v. Leach, 4 Jones, L. 340; Champion v. Memphis R. R. Co. 35 Miss. 692; Calcy v. Phila. etc. R. R. Co. 80 Pa. St. 363; Noesen v. Port Washington, 37 Wis. 168. But see White Hall etc. R. R. Co. v. Myers, 16 Abb. Pr. N. S. 34; Stockton etc. R. R. Co. v. Stockton, 51 Cal. 323.

9 Reading v. Wedder, 66 Ill. 80; Bucksport etc. R. R. Co. v. Buck, 68 Me. 60.

10 Randolph County v. Post, 93 U. S. 502.

11 Mobile etc. R. R. Co. v. Wisdom, 5 Heisk. 125; and compare Alley v. Adams County, 76 Ill. 101.

12 Swartwout v. Mich. etc. R. R. Co. 24 Mich. 389; Morris v. Cheney, 51 Ill. 451.

13 Ottawa etc. R. R. Co. v. Black, 79 Ill. 262.

14 *Nugent v. Supervisors*, 19 Wall. 241; *Mowrey v. Indianapolis etc. R. R. Co.* 4 Biss. 78; *Dorris v. Sweeny*, 64 Barb. 636; 60 N. Y. 463; *South Georgia etc. R. R. Co. v. Ayres*, 56 Ga. 230; *Jewett v. Valley Railw. Co.* 34 Ohio St. 601.

§ 241. **Legislative control over.**—The charter of a private corporation is a contract between the state and the corporation, which neither party is at liberty to disregard or repudiate.¹ And no fundamental change, even though authorized by subsequent legislation, can be made in the charter of a railroad company without the consent of the stockholders, unless the legislature has provided otherwise in the charter;² or unless, at the time of subscribing for stock, there are existing laws by which the charter may be fundamentally changed.³ But the charter of a railroad company cannot confer rights beyond the reach of the police power of the state;⁴ and the legislature may impose new and additional burdens not contained in the charter, and which are conducive to the general security, quiet, and good order.⁵ But it cannot, under the pretense of police regulations, destroy or impair the franchise, or any right or power essential to its beneficial exercise.⁶ A charter granted by two states to a railroad company is not only a contract with the company, but a compact between the states,⁷ and is to be liberally construed with reference to its objects;⁸ and the assent of all is necessary to the validity of a statute of either state, which infringes the powers of the company in such state.⁹ A railroad company created in one state, but having portions of its road in another state, will be regarded as a corporation of the latter state, so far as to be amenable to its laws.¹⁰ In the exercise of the general police power of the state, the legislature has power to regulate the speed of locomotives in passing through cities and towns;¹¹ and it may require railroads to fence their tracks, and make them liable for the value of stock killed by their trains in consequence of neglect to do so.¹² It likewise has power to limit the amount of charges by railroad companies for fares and freights, un-

less restrained by some contract in the charter.¹³ And a state law which prescribes a different mode of serving process upon railroad companies from that provided for in a charter previously granted to a particular company, is held not to impair the obligation of the contract involved in the charter.¹⁴

1 Thorpe v. Rutland etc. R. R. Co. 27 Vt. 140; Gorneau v. Pacific R. R. 26 Mo. 441; De Graff v. St. Paul etc. R. R. Co. 23 Minn. 144; Allen v. Buchanan, 9 Phila. 233; Flint etc. Plank Road Co. v. Woodhull, 25 Mich. 99; State v. Richmond etc. R. R. Co. 73 No. Car. 527.

2 Mowrey v. Indianapolis etc. R. R. Co. 4 Biss. 78; Cent. R. R. Co. v. State, 54 Ga. 401; Att.-Gen. v. Chicago etc. Railw. Co. 35 Wis. 425.

3 Hamilton v. Keith, 5 Bush, 458; State v. Commissioner etc. 37 N. J. L. 223; State v. Maine Cent. R. R. Co. 66 Me. 438; Mowrey v. Indianapolis etc. R. R. Co. 4 Biss. 78.

4 Kansas Pacif. Railw. Co. v. Mower, 16 Kan. 573; Portland etc. R. R. Co. v. Boston etc. R. R. Co. 85 Me. 122.

5 Nelson v. Vt. etc. R. R. Co. 26 Vt. 717; State v. New Haven etc. R. R. Co. 43 Conn. 351; People v. Boston etc. R. R. Co. 70 N. Y. 569.

6 Sloan v. Pacif. R. R. Co. 61 Mo. 24; 21 Am. R. 387; and see Lake View v. Rose Hill Cemetery Co. 70 Ill. 191.

7 Chesapeake etc. Canal Co. v. Ohio R. R. Co. 4 Gill & J. 1; Cleveland etc. R. R. Co. v. Speer, 56 Pa. St. 325.

8 Cleveland etc. R. R. Co. v. Speer, 56 Pa. St. 325.

9 Chesapeake etc. Canal Co. v. Ohio R. R. Co. 4 Gill & J. 1, 140.

10 McGregor v. Erie Railw. Co. 35 N. J. L. 115; and see Milnor v. New York etc. R. R. Co. 53 N. Y. 363. Compare New Orleans etc. R. R. Co. v. Wallace, 50 Miss. 244.

11 Mobile etc. R. R. Co. v. State, 51 Miss. 137; and see Cin. etc. R. R. Co. v. Sullivan, 32 Ohio St. 132.

12 Kansas Pacif. Railw. Co. v. Mower, 16 Kan. 573.

13 Chicago etc. R. R. Co. v. Iowa, 94 U. S. 153; Munn v. Illinois, 94 Id. 113. But see Phila. etc. R. R. Co. v. Bowers, 4 Houst. 506.

14 Railroad Co. v. Hecht, 95 U. S. 168.

§ 242. Rights as to property.—A railroad company has, from the very nature of its operations, the right at all times to the exclusive occupancy of the land taken for its road,¹ and the right to exclude all concurrent occupancy by the former owners, in any mode, and for any purpose.² A railroad track is private property, and the public have no right to pass upon it, except at highway crossings.³ Even a permission by the company to its employees to live within the inclosure of its road is not to be construed as a license to any others to walk upon the track in coming to the homes of such servants.⁴ The

company may maintain trespass for all entries and acts of the adjoining landowner, upon the land taken for its road, which may in the least degree embarrass the use of the road for the purposes for which it was built.⁵ And it may exclude persons from its grounds who have no legitimate business there, growing out of the operation of the road, or with the officers or employees of the company.⁶ It has a right to cut the trees growing on the strip of land taken for its road, whether such trees are for shade, ornament, or fruit.⁷ A railway company cannot, however, occupy lands within the limits of the right of way for purposes not necessarily connected with the use of its franchise.⁸ But the erection of buildings by the permission of the company, within such limits by other parties, for convenience in delivering and receiving freight, was held not to be inconsistent with the purposes for which the charter was granted.⁹ And although a railway company has no right to use a highway as a part of its freight-yard,¹⁰ it may pass and repass over a highway in making up its trains and shifting its cars, if done only to a reasonable extent and in a reasonable manner.¹¹ If a railroad runs through and divides a farm into two parts, so that the owner cannot pass from one part to the other without crossing the track, he has a right to cross, and is not necessarily a trespasser when his cattle are on the track.¹² And an officer armed with a warrant for the search of intoxicating liquors may, if necessary to the execution of the warrant, forcibly break and open the depot or warehouse of a railway company in which the liquors are stored,¹³ without even first asking permission of the person in charge.¹⁴ And, in general, the title of a railway company to its road-bed is necessarily subject to the exercise of all those powers reserved to the legislature, to which the franchises of the road are subject.¹⁵

1. *Commonw. v. Power*, 7 Met. 596; *Jackson v. Rutland etc. R. R. Co.* 25 Vt. 150.

2. *Hurd v. Rutland etc. R. R. Co.* 25 Vt. 121; *Troy etc. R. R. Co. v. Potter*, 42 Vt. 265.

- 3 *Isabel v. Hannibal etc. R. R. Co.* 60 Mo. 475.
- 4 *Galena etc. R. R. Co. v. Jacobs*, 20 Ill. 478.
- 5 *Conn. etc. R. R. Co. v. Holton*, 32 Vt. 43.
- 6 *Hall v. Power*, 12 Met. 482; *Harris v. Stevens*, 31 Vt. 79; *Landri-
gan v. State*, 31 Ark. 50; *Barker v. Midland Railw. Co.* 18 Com. B. 46;
and see *Caterham Railw. Co. v. London etc. Railw. Co* 1 Com. B. N. S.
410.
- 7 *Brainard v. Clapp*, 10 Cush. 6; and see *Preston v. Dubuque etc.
R. R. Co.* 11 Iowa. 18.
- 8 *Lance's Appeal*, 55 Pa. St. 16.
- 9 *Grank Trunk R. R. Co. v. Richardson*, 91 U. S. 454.
- 10 See *State v. Vt. Cent. R. R. Co.* 27 Vt. 103; *Lackland v. North Mo.
R. R. Co.* 31 Mo. 180.
- 11 *Gahagan v. Boston etc. R. R. Co.* 1 Allen. 187.
- 12 *Housatonic R. R. Co. v. Waterbury*, 23 Conn. 101.
- 13 *Androscoggin R. R. Co. v. Richards*, 41 Me. 233.
- 14 *Androscoggin R. R. Co. v. Richards*, 41 Me. 233.
- 15 *Albany etc. R. R. Co. v. Brownell*, 24 N. Y. 345; *People v. Boston
etc. R. R. Co.* 70 Id. 569; *Blaine v. Chesapeake etc. R. R.* 9 W. Va. 232;
and see *Swan v. Williams*, 2 Mich. 424.

§ 243. *Contracts by and with.*—The grant of a railroad franchise to a corporation confers, by implication, the power to make any contract which may be necessary to advance the objects for which the corporation was created, and which is not forbidden by the charter or act of incorporation.¹ Thus, unless restricted by law, a railroad company may take a bond for the payment of stock subscriptions in installments falling due at specified periods, and a mortgage of real estate to secure the same;² or it may issue bonds,³ or make a promissory note in order to carry out the ends of its creation;⁴ or may take a promissory note and negotiate it in the ordinary course of business.⁵ So, a railroad company, in possession of the franchise ordinarily conferred on such a company, may loan its surplus funds, and recover the same by the necessary action;⁶ and it has power to make a contract for the transportation of persons or property beyond its own line,⁷ either by sea or coach,⁸ or the road of another company;⁹ and it may assign its stock subscriptions, unless expressly restricted therefrom.¹⁰ A promise to pay a railroad company a certain sum, provided it locates its line at a particular place, is binding, and may be en-

forced.¹¹ And all contracts for stock in consideration of a particular location, when complied with by the company, are as binding on both parties as if the contract had been absolute and unconditional.¹² A statute which provides that no contract shall bind a railroad company unless made in writing must be limited to contracts wholly executory;¹³ and if the company has accepted and had the benefit of services rendered to it, on the oral request of its officers, it may be held liable for them, notwithstanding such statute.¹⁴ But a railroad company is bound by the contracts of its agents only where they keep within the limit of their authority.¹⁵ Contracts entered into by railway companies, which are *ultra vires*,¹⁶ are incapable of being enforced by any one.¹⁷ But if nothing remains to be done with respect to the contract but the payment by the corporation of the consideration, it will not be allowed to set up the defense that the contract was *ultra vires*.¹⁸ In such case, the courts will leave the parties to abide their acts.¹⁹ A railroad company has no power to purchase or hold lands situated at a distance from its road, and not needed either in the construction or operation of the road.²⁰ Nor has it power, without special legislation, to enter into a contract to pay interest on stock before its road is completed or any income received.²¹ Nor can it contract for the transfer of its franchise to an individual, to enable him to build and maintain a railroad solely for his own use.²² And a contract by a horse railroad company, transferring the control of its road, with all its franchises, and receiving in return only a fixed rent, payable in the form of a dividend to its stockholders, is held to be *ultra vires*, and void.²³ And, in general, railroad companies have no right to engage or pledge their funds, or entangle their affairs, in unauthorized transactions, upon the assumption that they may afterwards obtain legislative authority.²⁴

1. *Muir v. Louisville etc. Canal Co.* 8 Dana, 161; *Western Bank v. Tallman*, 17 Wis. 530; *Old Colony R. R. Co. v. Evans*, 6 Gray, 23; *Strauss v. Eagle Ins. Co.* 5 Ohio St. 50.

- 2 *Western Bank v. Tallman*, 17 Wis. 530.
- 3 See *Hubbard v. New York etc. R. R. Co.* 36 Barb. 296; 14 Abb. Pr. 275; *Commonw. v. Pittsburg*, 41 Pa. St. 278; *State v. Florida etc. R. R. Co.* 15 Fla. 84; *Commissioners v. Atlantic etc. R. R. Co.* 77 No. Car. 239.
- 4 *Hamilton v. New Castle etc. R. R. Co.* 9 Ind. 359; *Phila. etc. R. R. Co. v. Lewis*, 33 Pa. St. 32; *Dubois v. N. Y. etc. R. R. Co.* 1 N. Y. Leg. Obs. 362.
- 5 *Frye v. Tucker*, 24 Ill. 180. But see *contra*, *Razeman v. Midland Wales Railw. Co.* Law R. 1 C. P. 453. One railroad corporation may, upon a sufficient consideration, guarantee the bonds of another railroad corporation; *Low v. Cent. Pacif. R. R.* 52 Cal. 52; 28 Am. R. 629; *Railroad Co. v. Howard*, 7 Wall. 411.
- 6 *North Carolina R. R. Co. v. Moore*, 70 No. Car. 6.
- 7 *Noyes v. Rutland etc. R. R. Co.* 27 Vt. 110; *Perkins v. Portland etc. R. R. Co.* 47 Me. 573. Compare *Elmore v. Naugatuck R. R. Co.* 23 Conn. 457; *Railroad Co. v. Pratt*, 22 Wall. 123; *Kyle v. Laurens R. R. Co.* 10 Rich. L. 382; *Rome R. R. Co. v. Sullivan*, 25 Ga. 238; *Johnson v. N. Y. Cent. R. R. Co.* 23 N. Y. 610; *Bryan v. Memphis etc. R. R. Co.* 11 Bush. 597; *Crouch v. London etc. Railw. Co.* 14 C. B. 255; *Fowles v. Great West. Railw. Co.* 7 Ex. 699; 16 Eng. L. & Eq. 331.
- 8 *Wheeler v. San Francisco etc. R. R. Co.* 31 Cal. 46; *Wilby v. West Cornwall Railw. Co.* 2 Hurl. & N. 703; *Buflit v. Troy etc. R. R. Co.* 36 Barb. 420; 40 N. Y. 168.
- 9 *Cary v. Cleveland etc. R. R. Co.* 29 Barb. 35.
- 10 *Downie v. Hoover*, 12 Wis. 174; and see *Swartwout v. Mich. etc. R. R. Co.* 24 Mich. 389.
- 11 *Cumberland Valley R. R. Co. v. Raab*, 9 Watts, 456; *First Nat. Bank v. Hendrie*, 49 Iowa, 541; 41 Am. R. 155; and see *Ruey v. Ebensburg etc. Plank R. Co.* 27 Pa. St. 261; *First Nat. Bank v. Hurford*, 29 Iowa, 579.
- 12 *Taggart v. West. Md. R. R. Co.* 24 Md. 563; *Mich. etc. R. R. Co. v. Bacon*, 33 Mich. 465. Compare *Scotland County v. Thomas*, 94 U. S. 682; *Pittsburg etc. R. R. Co. v. Plummer*, 37 Pa. St. 413.
- 13 *Foulke v. San Diego etc. R. R. Co.* 51 Cal. 365.
- 14 *Foulke v. San Diego etc. R. R. Co.* 51 Cal. 365. Compare *Mahaska County R. R. Co. v. Des Moines Valley R. R. Co.* 23 Iowa, 447; *Bradley v. Ballard*, 55 Ill. 413.
- 15 *Silliman v. Fredericksburg etc. R. R. Co.* 27 Gratt. 119.
- 16 See tit. *ULTRA VIRES*.
- 17 See *Mayor etc. v. Norfolk Railw. Co.* 4 EL. & B. 397; *Taylor v. Chichester etc. Railw. Co.* Law R. 2 Ex. 356; *Shrewsbury etc. Railw. Co. v. Northw. Railw. Co.* 6 H. L. Cas. 113; *Midland Railw. Co. v. London etc. Railw. Co.* Law R. 16 Eq. 638; *Morris etc. R. R. Co. v. Sussex R. R. Co.* 20 N. J. Eq. 647; *Bissen v. Mich. etc. R. R. Co.* 23 N. Y. 258; *Union Bridge Co. v. Troy etc. R. R. Co.* 7 Lans. 241; *Hoagland v. Hannibal etc. R. R. Co.* 33 Mo. 451; *Fisk v. Chicago etc. R. R. Co.* 53 Barb. 513; *Arnot v. Erie Railw. Co.* 67 N. Y. 315.
- 18 *Oil Creek etc. R. R. Co. v. Penn'a Transp. Co.* 83 Pa. St. 160; and see tit. *ULTRA VIRES*.
- 19 *Clarke v. Omaha etc. R. R. Co.* 5 Neb. 314; and see *Stewart v. Nat. Union Bank*, 2 Abb. (U. S.) 424.
- 20 *Waldo v. Chicago etc. R. R. Co.* 14 Wis. 575; and see *Pacif. R. R. Co. v. Seely*, 45 Mo. 212.
- 21 *Painesville etc. R. R. Co. v. King*, 17 Ohio St. 534.
- 22 *Stewart's Appeal*, 58 Pa. St. 413. See also *Abbott v. Johnstown etc. R. R. Co.* 80 N. Y. 27.

23 *Middlesex R. R. Co. v. Boston etc. R. R. Co.* 115 Mass. 347; and see *Richardson v. Sibley*, 11 Allen, 65, 67; *Wood v. Bedford R. R. Co.* 8 Phila. 94; *York etc. R. v. Winans*, 17 How. 36; *Pierce v. Emery*, 32 N. H. 504.

24 *Logan v. Courtown*, 13 Beav. 22. Compare *Supervisors of Portage v. Wisconsin etc. R. R. Co.* 121 Mass. 460.

§ 244. **Dissolution.**—Railroad companies may be dissolved by the modes of dissolution applicable to private moneyed corporations in general.¹ If the act of incorporation itself fixes a definite time at which the charter shall expire, when that time arrives, the company is of course dissolved.² And a railroad company may voluntarily abandon its charter and dissolve itself, except so far as creditors have a right to object, and so far as the company's obligation to the public to exercise its franchise may interfere.³ So the charter may be made liable to repeal by the legislature, by an amendment accepted by the company, reserving the power, although the charter was before irrevocable.⁴ It is not every neglect of a railroad company to perform the duties imposed by its charter that will operate as a forfeiture of its franchises.⁵ To warrant a forfeiture there must be some positive act in violation of the charter, and in derogation of public right, willfully done.⁶ A mere failure on the part of the company to file a survey and map of the route of its road, within the time allowed by the charter for doing so, ought not to be deemed a sufficient ground of forfeiture.⁷ A railroad corporation is not dissolved by a lease of its road for the term of the charter;⁸ nor by the sale of its rolling-stock and personal property;⁹ nor by the sale of the road itself;¹⁰ although these might be grounds of forfeiture.¹¹ Whether the consolidation of two railroad companies works a dissolution of both, and the creation of a new corporation, is held to depend upon the legislative intent manifested in the statute under which the consolidation takes place.¹²

1 See tit. DISSOLUTION.

2 *La Grange etc. R. R. Co. v. Rainey*, 7 Cold. 420; and see *Atlantic etc. R. R. Co. v. Allen*, 15 Fla. 637.

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3 *Lanuan v. Lebanon Valley R. R. Co.* 30 Pa. St. 42. And see *Canal Co. v. Railroad Co.* 4 Gill & J. 1; *La Grange etc. R. R. Co. v. Rainey*, 7 Cold. 42^o

4 *Mobile etc. R. R. Co. v. State*, 29 Ala. 573.

5 *Harris v. Miss. Valley etc. R. R. Co.* 51 Miss. 602.

6 See *State v. Pawtuxet Turnp. Co.* 8 R. I. 182; *Miss. etc. R. R. Co. v. Cross*, 20 Ark. 443; *Commonw. v. Fitchburg R. R. Co.* 12 Gray, 180; *Eastern Archipelago Co. v. Reg.* 3 Ed. & B. 857; 22 Eng. L. & Ed. 328.

7 *Harris v. Miss. Valley etc. R. R. Co.* 51 Miss. 602.

8 *Troy etc. R. R. Co. v. Kerr*, 17 Barb. 581.

9 *Bruffet v. Great West. R. R. Co.* 25 Ill. 353.

10 *Bruffet v. Great West. R. R. Co.* 25 Ill. 353; *State v. Rives*, 5 Ired. 297.

11 *Arthur v. Commercial etc. Bank*, 9 Smodes & M. 394; *State v. Pawtuxet Turnp. Co.* 8 R. I. 521.

12 *Central R. R. etc. v. Georgia*, 92 U. S. 665. See tit. CONSOLIDATION.

§ 245. Acquisition of lands.—In England, railway companies are enabled by statute to purchase by contract with the owners such estates or interests in any lands as may be requisite for railway purposes.¹ And in this country, the power to acquire lands by agreement with the owner is usually conferred in the charters of railway companies.² And it is now a well established doctrine, that, in the exercise of the power of eminent domain, the legislature may confer authority upon a railroad company to take the requisite real estate for its purposes, provided suitable compensation be made therefor.³ But the authority to take the lands of individuals by compulsion, must be exercised strictly in conformity to the terms of the charter.⁴

1 See *In re Horner's Estate*, 5 De Gex & S. 483; *Hutton v. London etc. Railw. Co.* 7 Hare, 264.

2 *Whitcomb v. Vt. Cent. R. R. Co.* 25 Vt. 49, 69; and see *Kenney v. Wallace*, 24 Hun, 478.

3 *San Francisco etc. R. R. Co. v. Caldwell*, 31 Cal. 367; *Stockton etc. R. R. Co. v. Stockton*, 41 Id. 147; *Brown v. Beatty*, 34 Miss. 227; *Secombe v. Railroad Co.* 23 Wall. 108; *In re New York etc. R. R. Co. v. Kip*, 46 N. Y. 546; *Johnson v. Joliet etc. R. R. Co.* 23 Ill. 202; *Bradley v. New York etc. R. R. Co.* 21 Conn. 294.

4 See *In re N. Y. etc. R. R. Co. v. Kip*, 46 N. Y. 546; *Taylor v. Cleason*, 2 Ad. & E. N. S. 978, 1031; *Edward v. Lawrenceburgh, etc. R. R. Co.* 7 Ind. 711; *Adams v. Saratoga etc. R. R. Co.* 10 N. Y. 523.

§ 246. Acquisition by grant or license.—A railway company may acquire real estate by consent or grant

of the owner, and hold the same for the purpose of aiding "in the construction, maintenance, and accommodation of its railway."¹ And in such case, the rights and liabilities of the company are the same as where the lands are acquired by virtue of the right of eminent domain.² A verbal consent of the owner of the lands taken is sufficient,³ and will excuse any acts properly done under the license while it was in force;⁴ and such consent is a bar to the recovery of damages for the use of the land, until the permission is revoked.⁵ And where a railway company constructs its road upon land, under the license, and by permission of the owner, the rails and other materials forming a part of the road are to be deemed trade fixtures, and liable to the same rules of law that govern personal property.⁶ A contract to convey lands for railway purposes, on condition that the company shall construct its road to a certain place, and locate its depot within a certain town, is not against public policy, or void.⁷ But it is otherwise, if the land so conveyed is to be used for purposes of speculation, and not for the general business of locating, constructing, managing, and using the road.⁸ It is, however, presumed that lands deeded to a railroad company are required for the construction of its road.⁹ A railroad company may compel the specific performance of a contract to convey a right of way, after complying with the conditions thereof.¹⁰ And delay on the part of the company to commence work, or to complete its road within the time fixed by its charter, will not excuse one who has agreed to convey land to the company from fulfilling his contract.¹¹ But if a contract is so vague and uncertain that no compensation could be awarded, specific performance will not be decreed;¹² so if considerable time has elapsed, and the company is not in possession of funds to complete the purchase, the court will not interfere;¹³ nor will specific performance be decreed when it may interfere with the safety or convenience of the public.¹⁴ If the owner of land agrees to relinquish to a

railroad company the right of way through his land, with a provision in the contract that the depot shall be located at a certain designated point on the land, he cannot, after relinquishment and entry by the company, maintain trespass or ejectment against it, for failing so to locate the depot.¹⁵ The remedy of the landowner in such case is an action for damages for breach of contract, or a suit in equity for specific performance.¹⁶ Land granted by Congress to a state, although for the purpose of aiding the construction of a particular road, becomes subject to the control and disposition of the state legislature.¹⁷ But lands granted by the United States to the Union Pacific Railroad Company are not liable to be taxed by the state.¹⁸ All public grants to railroads will, as a rule, be strictly construed.¹⁹ Mere occupancy of land by a railroad company, for its corporate purposes, cannot establish a dedication of such land by the owner to such purposes;²⁰ knowledge and acquiescence on his part for the full period fixed by statute for the limitation of real actions must be shown.²¹ And where a statute provides that railroad companies may acquire sites for depots, etc., by donation, by purchase, or by appropriation, but contains no provision for acquisitions by dedication, a railway company cannot acquire land for a depot-site by dedication.²² If a railway company, without acquiring title, and without the consent of the owner, take possession of land and lay its track thereon, the fixtures thus placed on the land become the property of the owner of the soil;²³ and he is entitled, on subsequent proceedings by the company to acquire title, to the increased value of the land by reason of the laying of the track.²⁴

1 See *Whitcomb v. Vt. Cent. R. R.* 25 Vt. 49; *Virginia etc. R. R. Co. v. Elliott*, 5 Nev. 358; *McClure v. Mo. etc. R. Co.* 9 Kan. 373.

2 *Babcock v. Western R. R. Co.* 9 Met. 553; *Hortsmann v. Lexington etc. R. R. Co.* 18 B. Mon. 218.

3 *Central R. R. Co. v. Hetfield*, 5 Dutch. 206; *id.* 571.

4 *Blaisdell v. Portsmouth etc. R. R.* 51 N. H. 493.

5 *Miller v. Auburn etc. R. R. Co.* 6 Hill, 61. And compare *Murdock v. Prospect Park etc. R. R.* 73 N. Y. 579.

- 6 North Cent. R. R. Co. v. Canton Co. 30 Md. 347.
- 7 McClure v. Mo. etc. R. R. Co. 9 Kan. 373.
- 8 Pacif. R. R. Co. v. Seely, 45 Mo. 212. Compare Waldo v. Chicago etc. R. R. Co. 14 Wis. 575.
- 9 Yates v. Van De Bogert, 56 N. Y. 526.
- 10 Chicago etc. R. R. Co. v. Swinney, 33 Iowa, 182; and see Barlow v. Chicago etc. R. R. Co. 29 Id. 276.
- 11 Ross v. Chicago etc. R. R. Co. 77 Ill. 127; and see Conwell v. Springfield etc. R. R. Co. 81 Id. 232.
- 12 Tillett v. Charing Cross Co. 28 Beav. 419. And compare Detroit etc. R. R. Co. v. Forbes, 30 Mich. 165.
- 13 Pryse v. Cambrian Railw. Law R. 2 Ch. App. 444.
- 14 Raphael v. Thames Valley Railw. Law R. 2 Ch. App. 37; and see Rockford etc. R. R. Co. v. Shunick, 65 Ill. 223.
- 15 Hubbard v. Kansas etc. R. R. Co. 63 Mo. 68; and see Hornback v. Cin. etc. R. R. Co. 20 Ohio St. 81; N. J. etc. R. R. Co. v. Van Syckle, 37 N. J. L. 4 6; St. Louis etc. R. R. Co. v. Mathers, 71 Ill. 532; Morris v. Indianapolis etc. Railw. Co. 76 Id. 322; Walsh v. Barton, 24 Ohio St. 28. But compare Conger v. Burlington etc. R. R. Co. 41 Iowa, 419.
- 16 Hubbard v. Kansas etc. R. R. Co. 63 Mo. 68; and see Baker v. Chicago etc. R. R. Co. 57 Id. 275.
- 17 Little Rock etc. R. R. Co. v. Howell, 31 Ark. 119. See as to grants by the United States in aid of railroad companies: Lake Superior etc. R. R. Co. v. United States, 93 U. S. 442; Central Pacif. R. R. Co. v. Yolland, 41 Cal. 438; Hunnewell v. Burlington etc. R. R. Co. 3 Dill. 313; Newball v. Sanger, 92 U. S. 761; Sioux City etc. Railw. Co. v. Osceola County, 43 Iowa, 318; White v. Burlington etc. R. R. Co. 5 Neb. 333; Kaiser v. McLoughlin, 49 Cal. 449; Farnsworth v. Minn. etc. R. R. Co. 92 U. S. 43. And see as to grants by states: People v. Ill. Cent. R. R. Co. 62 Ill. 510; People v. Ketchum, 73 Id. 212; Davis v. Gray, 16 Wall. 203; Houston etc. R. R. Co. v. Kuechler, 36 Tex. 332.
- 18 Union Pacif. R. R. Co. v. McShane, 13 Int. Rev. Rec. 63.
- 19 Packer v. Sunbury etc. R. R. Co. 19 Pa. St. 211.
- 20 Daniels v. Chicago etc. R. R. Co. 35 Iowa, 129.
- 21 Daniels v. Chicago etc. R. R. Co. 35 Iowa, 129.
- 22 Todd v. Pittsburg etc. R. R. Co. 19 Ohio St. 514. Compare McWilliams v. Morgan, 61 Ill. 89.
- 23 Van Size v. Long Island R. R. Co. 3 Hun. 613; 6 Thomp. & C. 298.
- 24 Van Size v. Long Island R. R. Co. 3 Hun. 613; 6 Thomp. & C. 298; Graham v. Connorsville etc. R. R. Co. 33 Ind. 433; 10 Am. R. 56. But see California etc. R. R. Co. v. Armstrong, 46 Cal. 85; Justice v. Nesquehoning Valley R. R. Co. 87 Pa. St. 28.

§ 247. Eminent domain.—Acts of the legislature authorizing railroad companies to appropriate lands by the exercise of the right of eminent domain are valid and constitutional acts.¹ But the necessity of such appropriation must exist, as a condition precedent to the exercise of the right;² and it is incumbent upon the company to show that it has substantially complied with all the conditions which

the law has annexed to the exercise of the power.³ A statute authorizing the exercise of the power must be construed strictly.⁴ Land cannot be taken for the general uses of the company, in addition to the uses specified in the statute.⁵ A general grant of power to take land for the track of a railway does not authorize the company to take land for a temporary track during the construction of the main line.⁶ And the acquisition of lands for the purpose of speculation, or to prevent competition, or in aid of collateral enterprises, is not authorized under such a grant of power.⁷ And so of the acquisition of lands for the erection of a manufactory of railroad cars,⁸ or for the purpose of erecting dwelling-houses to rent to the employees of the company.⁹ But land may be taken for turn-outs, depots, engine-houses, and turn-tables,¹⁰ and for the erection of shops for the repair of cars and locomotives;¹¹ or for piling wood and lumber used on the road, and brought to it for transportation thereon.¹² And the power to acquire land for necessary "appendages" is held not to be exhausted by an apparent completion of the road, where an increase of business demands other appendages, or more room for tracks.¹³ A railroad company having general powers to locate its road, and take land for it, may cross a public highway, subject to the duty of making compensation to private owners.¹⁴ So it may divert a stream of water flowing across the line of its road;¹⁵ and may institute proceedings against the owner of a stratum of coal, to obtain from him an underground right of way.¹⁶ And authority may be conferred upon a railway company to acquire springs near its road, where water is essential to its use, and it cannot be otherwise procured.¹⁷ But a railway company has no right to take for the use of its road lands held for certain specific purposes by a municipal corporation.¹⁸ And in New York, the power of a railway company to take property does not extend to that which is already held and dedicated by authority of law to a

different public use;¹⁹ nor does it extend to the acquisition of lands outside of its way for the purpose of enabling it to obtain gravel therefrom for the construction of its road.²⁰ A state legislature may authorize the construction of railroads through land owned but not occupied by the United States;²¹ and a dwelling-house is no more exempt than any other species of real estate from the right of eminent domain.²² And where a statute provides that no corporation shall take any dwelling-house without the consent of the owner, the term "dwelling-house" refers only to the house, and does not include any part of the garden, orchard, or curtilage.²³ So all private contracts are subordinate to the right of eminent domain.²⁴ It is for the courts to determine as to the necessity and extent of the appropriation of lands by a railway company in the exercise of the right of eminent domain;²⁵ but they will not usually interfere with the exercise of the right, except in cases of gross abuse.²⁶

1 *Bloodgood v. Mohawk etc. R. R. Co.* 18 Wend. 9; and see *Bradley v. N. Y. etc. R. R. Co.* 21 Conn. 234; *Weir v. St. Paul etc. R. R. Co.* 14 Minn. 155; *Moore v. Superior etc. R. R. Co.* 34 Wis. 173; *Shipley v. Baltimore etc. R. R. Co.* 34 Md. 336; tit. EMINENT DOMAIN. The legal existence of a corporation authorized to construct a railroad is at the foundation of the right to take property for its use, under the right of eminent domain: *Matter of Brooklyn etc. Rallw. Co.* 72 N. Y. 245.

2 *New York etc. R. R. Co. v. Metropolitan Gas Light Co.* 5 Hun, 201; *Reed v. Louisville Bridge Co.* 8 Bush, 69; *Leisse v. St. Louis etc. R. R. Co.* 2 Mo. App. 105.

3 *Atlantic etc. R. R. Co. v. Sullivan*, 5 Ohio St. 276; *Atkinson v. Marietta etc. R. R. Co.* 15 Id. 21; *Phillips v. Dunkirk etc. R. R. Co.* 78 Pa. St. 177; *Bonsart v. Camden etc. R. R. Co.* 1 Bald. 218; *Halstead v. Mayor etc.* 3 N. Y. 439.

4 *Unangst's Appeal*, 55 Pa. St. 128; *N. Y. etc. R. R. Co. v. Kip*, 46 N. Y. 546; *Gray v. Liverpool etc. Rallw. Co.* 9 Beav. 391.

5 *Spofford v. Bucksport etc. R. R. Co.* 66 Me. 26.

6 *Currier v. Marietta etc. Rallw. Co.* 11 Ohio St. 228; and see *Memphis Freight Co. v. Mayor etc.* 4 Cold. 419.

7 *Bensselaer etc. R. R. Co. v. Davis*, 43 N. Y. 157.

8 *Eldridge v. Smith*, 34 Vt. 484.

9 *Eldridge v. Smith*, 34 Vt. 484.

10 *Bird v. Wilmington etc. R. R. Co.* 8 Rich. Eq. 46; *Hannibal etc. R. R. Co. v. Muder*, 40 Mo. 165; *N. Y. etc. R. R. Co. v. Metrop. Gas Light Co.* 5 Hun. 201; 63 N. Y. 326; *N. Y. etc. R. R. Co. v. Kip*, 46 Id. 546; 7 Am. R. 385; *Phila. etc. R. R. Co. v. Williams*, 54 Pa. St. 103; *Giesy v. Cin. etc. R. R. Co.* 4 Ohio St. 308.

- 11 *Chicago etc. R. R. Co. v. Wilson*, 17 Ill. 123; *Hannibal etc. R. R. Co. v. Muder*, 49 Mo. 165.
- 12 *Eldridge v. Smith*, 34 Vt. 484; and see *N. Y. etc. R. R. Co. v. Metrop. Gas Light Co.* 63 N. Y. 328.
- 13 *Toledo etc. R. R. Co. v. Daniels*, 16 Ohio St. 390; *Chicago etc. R. R. Co. v. Wilson*, 17 Ill. 123. Compare *Childs v. Central R. R. Co.* 23 N. J. L. 323; *Kier v. Boyd*, 60 Pa. St. 33; *Peavey v. Calais R. R. Co.* 30 Me. 428.
- 14 *State v. Montclair R. R. Co.* 35 N. J. L. 328. Compare *Baltimore etc. Turnp. Co. v. Union R. R. Co.* 35 Md. 224; *Cake v. Phila. etc. R. R. Co.* 87 Pa. St. 307.
- 15 *Baltimore etc. R. R. Co. v. Magruder*, 34 Md. 79.
- 16 *Brown v. Coffey*, 43 Pa. St. 405.
- 17 *Strohecker v. Alabama etc. R. R. Co.* 42 Ga. 509.
- 18 *State v. Montclair R. R. Co.* 35 N. J. L. 328.
- 19 *Matter of Boston etc. R. R. Co.* 53 N. Y. 574.
- 20 *N. Y. etc. R. R. Co. v. Gunnison*, 1 Hun, 496; 3 *Thomp. & C.* 632.
- 21 See Ill. Cent. R. R. Co. v. United States, 10 Law R. N. S. 630; *Att.-Gen. v. Detroit etc. Plank R. Co.* 2 Mich. 138.
- 22 *Brocket v. Ohio etc. R. R. Co.* 14 Pa. St. 241; *Wells v. Somerset etc. R. R. Co.* 47 Me. 345.
- 23 *Wells v. Somerset etc. R. R. Co.* 47 Me. 345.
- 24 *N. Y. etc. R. R. Co. v. Boston etc. R. R. Co.* 36 Conn. 196; *Brown v. Corey*, 43 Pa. St. 405. Compare *Kip v. N. Y. etc. R. R. Co.* 67 N. Y. 227.
- 25 *Bensselaer etc. R. R. Co. v. Davis*, 43 N. Y. 137.
- 26 *Eldridge v. Smith*, 34 Vt. 484; *Dietrich v. Murdock*, 43 Mo. 297; *Ford v. Chicago etc. R. R. Co.* 14 Wis. 609. See *Flower v. London etc. Railw. Co.* 2 Drew. & S. 332.

§ 248. Compensation to landowners.—A railroad company, authorized to take land for its road, must make compensation to the owners of the land before entering upon and permanently occupying such land.¹ The value of the land must be ascertained by legal and proper process, and be paid;² or an adequate and safe fund must at least be provided for the future compensation of the landowner.³ The right of the landowner to the damages awarded is correlative to that of the company to the land.⁴ Nor can one railroad company appropriate for the construction of its road the franchises or property of another, without making compensation therefor.⁵ If the company take possession of the lands of the owner, without his consent, prior to the assessment of damages and tender of compensation, such owner may sue the com-

pany to recover possession of the land.⁶ But a subsequent purchaser from the then owner of the land taken cannot, it seems, maintain the action.⁷ And the owner may waive his right to oust the trespasser, if he sees fit, and proceed for compensation.⁸ So, if a landowner consents to the making of a railroad across his land before the damages are to be ascertained and paid, under some arrangement with the company as to the subsequent payment of damages, he cannot afterward prevent the work in progress, or the use of the road;⁹ nor, in the absence of a binding contract to that effect, can he assert a lien on the land thus taken and occupied for the road, in the nature of a vendor's lien.¹⁰ The use of a street for a railroad is held to be a new burden beyond the public easement, which cannot be imposed by legislative authority without compensation to the owner of the fee.¹¹ And the owner of land bounded on a stream not navigable is entitled to compensation for land taken by a railway company to the center of the stream.¹² But a public street may be used for a railroad, without compensation to the owners of lots abutting on such street, who have no title to the soil of the street itself.¹³ And it is held, that a portion of a turnpike road may be used for a railroad track, without compensation to the owners of land along the line of such turnpike, who have already been compensated for the condemnation of their property;¹⁴ if abundant room is left for travelers who do not use the railroad, the latter is not a new use, but merely a modification of the old one.¹⁵ And where a change of uses for which land was taken is made, as from a canal to a railroad, the landowner can recover compensation for such additional burdens and inconveniences only, not common to the general public, as accrued to him by reason of such change.¹⁶ If a railroad company, by right of eminent domain, takes for a passenger station land occupied by another railroad company, and the latter is thereby deprived of part of its business, compensation must be

made for the loss.¹⁷ By a provision of the general railroad act of New York, it is made a prerequisite to proceedings *in invitum* to acquire title to lands, that the company shall be "unable to agree for the purchase";¹⁸ which is construed to mean, that the owner must be either unwilling to sell at all, or only willing to sell at a price which, in the judgment of the agents of the company, is excessive.¹⁹ In proceedings to acquire lands under the Missouri statutes, no title will pass unless it appears affirmatively, from the record, that the owner refused to relinquish his right of way to the company.²⁰ A statute, the provisions of which permit a railroad company to enter into the possession of and use the land sought to be condemned, during the pendency of proceedings for its condemnation, without providing compensation for the use and waste committed if the proceedings finally fail, is held to be unconstitutional.²¹

1 See *Blodgett v. Utica etc. R. R. Co.* 64 Barb. 580; *Avery v. Fox*, 1 Abb. U. S. 248; *Atlantic etc. Tel. Co. v. Chicago etc. R. R. Co.* 6 Biss. 159; *Shute v. Chicago etc. R. R. Co.* 26 Ill. 436; *Graham v. Columbus etc. R. R. Co.* 27 Ind. 260; *Murdock v. Prospect Park etc. R. R. Co.* 73 N. Y. 579; and see *Conn. River R. R. Co. v. County Comm'rs*, 127 Mass. 50; 34 Am. R. 338.

2 *Powers v. Bears*, 12 Wis. 218.

3 *St. Joseph etc. R. R. Co. v. Callender*, 13 Kan. 496; *Matter of New York etc. R. R. Co.* 60 N. Y. 118; *Mettler v. Easton etc. R. R. Co.* 23 N. J. Eq. 214; *Bohlinan v. Green Bay etc. R. R. Co.* 30 Wis. 105; *White v. Nashville etc. R. R. Co.* 7 Helsk. 813; *Dimmick v. Brodhead*, 76 Pa. St. 464; *Chesapeake etc. R. R. Co. v. Patton*, 6 W. Va. 147.

4 *Stacey v. Vt. Cent. Railw.* 27 Vt. 39. But no compensation is provided by law for injuries occasioned by the construction of a railroad, to any person from whom no land, estate, or materials are taken: *Rogers v. Kennebec etc. R. R. Co.* 35 Me. 319. And compensation is only necessary when private property is to be taken: *Penn'a R. R. Co. v. N. Y. etc. R. R. Co.* 23 N. J. Eq. 157.

5 *Grand Rapids etc. R. R. Co. v. Grand Rapids etc. R. R. Co.* 35 Mich. 265; and compare *Noll v. Dubuque etc. R. R. Co.* 33 Iowa. 65; *Little Miami etc. R. R. Co. v. Dayton*, 23 Ohio St. 510; *Peoria etc. R. R. Co. v. Peoria etc. R. R. Co.* 66 Ill. 174; *Cin. etc. R. R. Co. v. Danville etc. Railw. Co.* 75 Id. 113.

6 *Buffalo etc. R. R. Co. v. Ferris*, 26 Tex. 588; *Loop v. Chamberlain*, 20 Wis. 135; *Lyon v. Green Bay etc. Railw. Co.* 42 Id. 538; *Memphis etc. R. R. Co. v. Payne*, 37 Miss. 700; *Mo. etc. Railw. Co. v. Ward*, 10 Kan. 352; and see *Field v. Carnarvon etc. Railw. Co.* Law R. 5 Eq. 190.

7 *Central R. R. Co. v. Hetfield*, 29 N. J. L. 206; and see *Hentz v. Long Island R. R. Co.* 13 Barb. 646; *Rooncy v. Sacramento etc. R. R. Co.* 6 Cal. 633; *McLendon v. Atlanta etc. R. R. Co.* 54 Ga. 293.

8 *McClinton v. Pittsburg etc. R. R. Co.* 66 Pa. St. 404; and see *Hosher v. Kansas City etc. R. R. Co.* 60 Mo. 329. Compare *Evansville etc. R. R. Co. v. Grady*, 6 Bush, 144.

9 *Knapp v. McAuley*, 39 Vt. 275; and see *Goodin v. Cin. etc. Canal Co.* 18 Ohio St. 169.

10 *Knapp v. McAuley*, 39 Vt. 275. Compare *Dayton etc. R. R. Co. v. Lewton*, 20 Ohio St. 401; *Ferrers v. Stafford etc. Railw. Co.* Law R. 13 Eq. 534; *Walker v. Ware etc. Railw. Co.* Law R. 11d. 195; *Wing v. Tattenham etc. Railw. Co.* Law R. 3 Ch. 740.

11 *Wager v. Troy etc. R. R. Co.* 25 N. Y. 526; *Stetson v. Chicago etc. R. R. Co.* 75 Ill. 74; *Ford v. Chicago etc. R. R. Co.* 14 Wis. 609; *Cox v. Louisville etc. R. R. Co.* 48 Ind. 178; *Southern Pacif. R. R. Co. v. Reed*, 41 Cal. 256; *Hegar v. Chicago etc. R. R. Co.* 28 Wis. 624; *Harty v. St. Paul etc. R. R. Co.* 21 Minn. 358. See *Railroad Co. v. Dayton*, 23 Ohio St. 510; *State v. Maine*, 27 Conn. 641.

12 *Chicago etc. R. R. Co. v. Stein*, 75 Ill. 41; and see *Barclay R. R. Co. v. Ingham*, 36 Pa. St. 194.

13 *Carson v. Central R. R. Co.* 35 Cal. 325; and see *Grand Rapids etc. R. R. Co. v. Helsel*, 38 Mich. 62; 31 Am. R. 306.

14 *Peddicord v. Baltimore etc. R. R. Co.* 34 Md. 463.

15 *Peddicord v. Baltimore etc. R. R. Co.* 34 Md. 463. For the purpose of constructing a telegraph line along its route for its own use, a railroad company may cut down trees standing on its way, without incurring additional liability to the original owner of the land for compensation: *Western Union Tel. Co. v. Rich*, 19 Kan. 517; 27 Am. R. 159.

16 *Hatch v. Cin. etc. R. R. Co.* 18 Ohio St. 92.

17 *Eastern R. R. Co. v. Boston etc. R. R. Co.* 111 Mass. 125. Compare *Mass. etc. R. R. Co. v. Boston etc. R. R. Co.* 121 Id. 124.

18 *Laws of 1850*, ch. 140, § 13.

19 *Matter of Prospect Park etc. R. R. Co.* 67 N. Y. 371.

20 *Ells v. Pacific R. R.* 51 Mo. 200.

21 *Cal. Pacif. R. R. Co. v. Cent. Pacif. R. R. Co.* 47 Cal. 523; *Davis v. San Lorenzo R. R. Co.* Id. 517. Compare *Shute v. Chicago etc. R. R. Co.* 28 Ill. 436; *Peterson v. Ferreby*, 30 Iowa, 827; *Cooper v. Chester R. R. Co.* 19 N. J. Eq. 198.

§ 249. Compensation, how estimated.—When the charter of a railroad company provides a mode for the landowner to obtain an appraisal of compensation, no other mode can be pursued.¹ But the remedy provided by statute, for the assessment of damages sustained by the taking of land for a right of way, is not exclusive of an action of ejectment, where property has been taken by the company without compensation being made.² And if a railroad company, instead of proceeding with the assessment of damages, promises to pay them, the landowner may recover on the special promise.³ The statutory proceedings for ascertaining damages must be strictly

pursued,⁴ and every essential prerequisite called for by the statute must affirmatively appear on the face of the proceedings.⁵ Notice of the proceedings to "owners" and "persons interested" ⁶ is essential.⁷ All the tenants in common of the land sought to be condemned must be before the court.⁸ The mortgagee of real estate is an "owner" so as to be entitled to notice.⁹ But judgment creditors of the owners, having a mere statutory lien, need not be made parties to the proceedings.¹⁰ Nor is a mere trustee of an equitable interest in the lands a necessary party.¹¹ And if the legislature locates a railroad on an avenue or highway, this dispenses with all necessity of notice and agreement with the commissioners of highways.¹² The inquiry as to the value of the land taken by a railroad company should relate to the time of the appropriation;¹³ and if payment is delayed, interest from that time may be added.¹⁴ The damages to be appraised are those arising to the landowner from a proper construction of the road in a prudent manner;¹⁵ and do not include damages for injuries that may result from any unauthorized or unlawful acts of the company, or from its neglect to perform a statutory duty.¹⁶ Redress may be had for such injuries by a resort to the proper action.¹⁷ Remote, indefinite, or merely possible damages should be excluded in awarding compensation.¹⁸ But in general, all inconveniences caused by embankments, excavations, and obstructions to the free use of buildings, and inconveniences from the sounding of whistles, ringing of bells, rattling of trains, jarring of the ground, and from smoke, so far as they severally arose from the use of the strip of land taken, and upon it, excluding all common and indirect damages, may be considered.¹⁹ The exposure of the remaining land and buildings to fire from the company's engines may be taken into consideration;²⁰ and so of the expense of erecting additional fences to which the landowner may be subjected.²¹ On the other hand, an allowance or deduction for special benefits accruing to other

property of the landowner may be made in favor of the company;²² but it is otherwise, as it respects general benefits to the landowner, common to others or to the whole community, resulting from the building of the road.²³ The damages should be estimated with reference to the purpose for which the land was acquired and used by the owner.²⁴ A building taken should be assessed at its value as such, instead of assessing the value of the materials.²⁵ And damages to a mill property in lessening the advantages of the water-power, present and prospective, may be considered.²⁶ But contingent future disadvantages and unopened mines are not to be taken into consideration.²⁷ In an action for damages for the unlawful construction of a railroad upon the plaintiff's land, he is entitled to recover the difference between the value of the land when the injury began, and the value afterwards;²⁸ and such exemplary damages as the evidence may warrant.²⁹ But the damages should not include the value of the land taken.³⁰

1 *Pettibone v. La Crosse etc. R. R. Co.* 14 Wis. 443; and see *New Albany etc. R. R. Co. v. Connelly*, 7 Ind. 32; *McIntire v. Western etc. R. R. Co.* 67 No. Car. 278.

2 *Daniels v. Chicago etc. R. R. Co.* 35 Iowa, 129; and see *Austin v. Rutland R. R. Co.* 45 Vt. 215; *St. Joseph etc. R. R. Co.* 13 Kan. 496; *Conger v. Burlington etc. R. R. Co.* 41 Iowa, 419; *Smith v. Chicago etc. R. R. Co.* 67 Ill. 191. As to the right of a landowner to an injunction against a railroad company, where his compensation has not been assessed or paid: see *Omaha etc. R. R. Co. v. Menk*, 4 Neb. 21; *New Orleans etc. R. R. Co. v. Frederic*, 46 Miss. 1; *Pickert v. Ridgely Park R. R. Co.* 25 N. J. Eq. 316; *Haecker v. St. Louis etc. R. R. Co.* 60 Ind. 127; *Gilman v. Sheboygan etc. R. R. Co.* 40 Wis. 653; *Cobb v. Ill. etc. R. R. Co.* 68 Ill. 233; *California etc. R. R. Co. v. Central etc. R. R. Co.* 47 Cal. 549; *Cosens v. Boguor Railw. Co.* Law R. 1 Ch. App. 594.

3 *Platt v. Western etc. R. R. Co.* 65 No. Car. 74.

4 *Cunningham v. Pacific R. R. Co.* 61 Mo. 33. And compare *N. Y. etc. R. R. Co. v. Kip*, 46 N. Y. 546.

5 *Cunningham v. Pacific R. R. Co.* 61 Mo. 33; and see *East Penn's R. R. Co. v. Schollenberger*, 54 Pa. St. 144.

6 See *McIntyre v. Easton etc. R. R. Co.* 26 N. J. Eq. 425; *Chicago etc. R. R. Co. v. Smith*, 78 Ill. 96. An owner is one who has some interest in the land at the time the injury was done: *Phila. etc. R. R. Co. v. Lawrence*, 10 Phila. 604.

7 *Lohman v. St. Paul etc. R. R. Co.* 18 Minn. 174.

8 *Grand Rapids etc. R. R. Co. v. Alley*, 34 Mich. 16.

9 *Severin v. Cole*, 38 Iowa, 463; *Martin v. London etc. Co.* Law R. 1 Eq. 145; *Mich. Air Line Railw. Co. v. Barnes*, 40 Mich. 383.

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10 *Watson v. New York etc. R. R. Co.* 47 N. Y. 157; 6 Abb. Pr. N. S. 91.

11 *McIntyre v. Easton etc. R. R. Co.* 26 N. J. Eq. 425.

12 *Matter of Prospect Park etc. R. R. Co.* 8 Hun. 30; 67 N. Y. 371. Compare *Matter of Marsh*, 71 N. Y. 315.

13 *Whitman v. Boston etc. R. R.* 7 Allen, 313; *Logansport etc. R. R. Co. v. Buchanan*, 51 Ind. 163. Compare *Lyon v. Green Bay etc. R. R.* 41 Wis. 638; *Metler v. Easton etc. R. R. Co.* 37 N. J. L. 222; *Graham v. Connersville etc. R. R. Co.* 36 Ind. 463; 10 Am. R. 56; *Hampden Point etc. Co. v. Springfield etc. R. R. Co.* 124 Mass. 118.

14 *Whitman v. Boston etc. R. R.* 7 Allen, 313; *Old Colony R. R. Co. v. Miller*, 125 Mass. 1. Compare *Atlantic etc. R. R. Co. v. Kobientz*, 21 Ohio St. 334; *Warren v. St. Paul etc. R. R. Co.* 21 Minn. 424; *Rhys v. Dare Valley Railw. Co.* Law R. 19 Eq. 93.

15 *Clark v. Vt. etc. R. R. Co.* 28 Vt. 103.

16 *Fleming v. Chicago etc. R. R. Co.* 34 Iowa, 353; *Clark v. Vt. etc. R. R. Co.* 28 Vt. 103.

17 *King v. Iowa Midland R. R. Co.* 34 Iowa, 458; and see *Turner v. Sheffield etc. Railw. Co.* 10 Mees. & W. 425.

18 *Lawrence v. Great Northern Railw. Co.* 15 Jur. 632; *Monongahela Nav. Co. v. Coon*, 6 Watts & S. 101; *Bangor etc. R. R. Co. v. McComb*, 60 Me. 290.

19 *Peoria etc. R. R. Co. v. Sawyer*, 71 Ill. 361; *Somerville etc. R. R. v. Doughty*, 2 Zab. 495; *Shenango R. R. Co. v. Braham*, 79 Pa. St. 447; *East Brandywine etc. R. R. Co. v. Bauck*, 78 Id. 454; *Tucker v. Mass. etc. R. R. Co.* 118 Mass. 546; *Walker v. Old Colony etc. R. R.* 103 Id. 10; 4 Am. R. 609; *Matter of Poughkeepsie etc. R. R. Co.* 63 Barb. 151; *Albany etc. R. R. Co. v. Dayton*, 10 Abb. Pr. N. S. 183; *Virginia etc. R. R. v. Hewry*, 8 Nev. 165; *Sherwood v. St. Paul etc. R. R. Co.* 21 Minn. 127; *Adden v. White Mts. etc. R. R. Co.* 55 N. H. 413; *Kostendare v. Pierce*, 37 Iowa, 645; *Gear v. Railroad Co.* 43 Id. 83; *Baltimore etc. R. R. Co. v. Lansing*, 52 Ind. 229; *Va. etc. Railw. Co. v. Lynch*, 13 Nev. 92; *North Pacific R. R. Co. v. Reynolds*, 50 Cal. 90. The proper inquiry is, what is the fair marketable value of the whole land taken, without the railway, and then what will be the fair marketable value of the land not taken? The difference will be the true amount of compensation to be awarded: *Black River etc. R. R. Co. v. Barnard*, 9 Hun, 104; and see *Matter of N. Y. etc. R. R. Co.* 6 Id. 149; *Matter of Prospect Park etc. R. R. Co.* 24 Id. 199; *Louisville etc. Railw. v. Thompson*, 18 Mon. B. 735; *San Francisco etc. R. R. Co. v. Caldwell*, 31 Cal. 367; *Powers v. Hazleton etc. Railw. Co.* 33 Ohio St. 429.

20 *Adden v. White Mts. R. R. Co.* 55 N. H. 413; 20 Am. R. 229. But compare *Patten v. Northern R. R. Co.* 33 Pa. St. 426; *Lehigh Valley R. R. Co. v. Lazarus*, 28 Id. 203.

21 *Winona etc. R. R. Co. v. Denman*, 10 Minn. 267; *Raleigh etc. R. R. Co. v. Wicker*, 74 No. Car. 220; *Louisville etc. R. R. Co. v. Glazebrook*, 1 Bush 325.

22 *Railroad Co. v. Tyree*, 7 W. Va. 693; *Henderson etc. Railw. v. Dickerson*, 17 Mon. B. 173; *Wilson v. Rockford etc. R. R. Co.* 59 Ill. 273; *Todd v. Kankakee etc. R. R. Co.* 78 Id. 530; *Greenville etc. Railw. v. Partlow*, 5 Rich. 428.

23 *Woodfolk v. Nashville etc. Railw.* 2 Swan, 422; *Little Miami Railw. v. Collett*, 6 Ohio St. 182; *Hornstein v. Atlantic etc. R. R. Co.* 81 Pa. St. 87; *Minn. etc. R. R. Co. v. McNamara*, 13 Minn. 608; *Hooper v. Kansas City etc. R. R. Co.* 60 Mo. 303. Compare *California etc. R. R. Co. v. Armstrong*, 46 Cal. 85.

24 *Welch v. Milwaukee etc. Railw. Co.* 27 Wis. 168.

- 25 *Lafayette etc. R. R. Co. v. Winalow*, 66 Ill. 219.
 26 *Dorlan v. East Brandywine etc. R. R. Co.* 46 Pa. St. 520.
 27 *Searle v. Lackawanna R. R. Co.* 33 Pa. St. 57.
 28 *Chicago etc. R. R. Co. v. Baker*, 73 Ill. 316. Compare *Hartz v. St. Paul etc. R. R. Co.* 21 Minn. 353; *Harrison v. Iowa etc. R. R. Co.* 36 Iowa. 323; *Chicago etc. R. R. Co. v. Davis*, 86 Ill. 20.
 29 *Anderson etc. R. R. Co. v. Kernodle*, 54 Ind. 314.
 30 *Anderson etc. R. R. Co. v. Kernodle*, 54 Ind. 314; *Sherman v. Milwaukee etc. R. R. Co.* 40 Wis. 645.

§ 250. **Title or interest acquired in lands.**—The right of passage which a railroad company acquires across the land of private individuals, whether by private purchase,¹ or under the right of eminent domain,² is an interest in the land.³ In some of the states, railway companies may acquire the absolute fee in land by purchase and deed in fee-simple,⁴ and sell and convey the same, when no longer needed for the corporate purposes.⁵ It has, however, been held, that a railway, by a deed in fee-simple, acquires only a right of way.⁶ And it is the general rule in the United States, that the title acquired by railroad companies, under statutory proceedings to condemn lands, is not the absolute fee-simple, but merely the right to use the lands for their purpose.⁷ The fee remains in the owners, subject to that use, and on the discontinuance of the use, such owners are entitled to resume possession.⁸ Trees standing on the land taken, and which may be useful in the construction of its road, become the property of the company.⁹ So the company may use, in the construction of its road, materials removed in grading it;¹⁰ but may not sell such materials.¹¹ Nor does the company, in procuring its right of way, acquire the right to enter upon and dig ditches through lands adjacent thereto;¹² nor the right to divert a stream of water from its natural channel, to the injury of the landowner.¹³ And the right to the minerals below the surface of the land taken remains in the landowner, subject only to the right of the company to construct and operate its road as authorized by law.¹⁴ But one whose land has been taken for a railroad cannot afterward rightfully enter thereon, and

dig and carry away the soil, or do any other act which interferes with the use of the land by the railroad company.¹⁵ And where a railroad company acquires the fee of lands for its road, it has an exclusive right to unobstructed possession above its road.¹⁶ Authority to a railroad company to locate its road upon certain land does not authorize it to convert the land to a different purpose;¹⁷ as, for instance, to the construction of a toll-house.¹⁸ But where the charter of such company authorizes it to acquire, by purchase, real estate necessary for the construction of its road, lands deeded to it will be presumed to be acquired for that purpose.¹⁹ Land taken by the state for a railroad, either by a fee-simple purchase, or by right of eminent domain, does not revert to the original owner upon an abandonment of the use for which it was taken.²⁰

1 See *ante*, § 248.

2 See *ante*, § 247.

3 East Penn'a R. R. Co. v. Schollenberger, 54 Pa. St. 144.

4 See Nicoll v. N. Y. etc. Railw. Co. 12 N. Y. 121; Page v. Heineberg, 40 Vt. 81.

5 Yates v. Van De Bogert, 56 N. Y. 526; Kenney v. Wallace, 24 Hun, 478.

6 See Dean v. Sullivan Railw. 22 N. H. 316; United States v. Harris, 1 Sum. 21.

7 West Penn'a R. R. Co. v. Johnson, 59 Pa. St. 290; Kellogg v. Mallin, 50 Mo. 436; 11 Am. R. 426; Railroad Co. v. Davis, 2 Dev. & B. 457; Heard v. Brooklyn, 60 N. Y. 242; Kansas Cent. Railw. Co. v. Allen, 22 Kan. 285; 31 Am. R. 190; Alabama etc. R. R. Co. v. Burkett, 42 Ala. 83. In Vermont, the title acquired is ordinarily the entire fee: Troy etc. R. R. Co. v. Potter, 42 Vt. 265. And in Minnesota the easement of railroad companies in lands taken for their roads, is practically equivalent to the fee: Robbins v. St. Paul etc. R. R. Co. 22 Minn. 286.

8 Alabama etc. R. R. Co. v. Burkett, 42 Ala. 83; Strong v. Brooklyn, 68 N. Y. 1; Jackson v. Rutland etc. Railw. Co. 25 Vt. 151; Hastings v. Railroad Co. 38 Iowa, 316. Compare Pinkerton v. Boston etc. R. R. Co. 109 Mass. 527; Woodworth v. Payne, 74 N. Y. 196, 201.

9 Taylor v. N. Y. etc. R. R. Co. 38 N. J. L. 28; Blake v. Rich, 34 N. H. 282. And see Brainard v. Clapp, 10 Cush. 6; Preston v. Dubuque etc. R. R. Co. 11 Iowa, 15.

10 Evans v. Haefner, 29 Mo. 141; Chapin v. Sullivan R. R. 39 N. H. 564.

11 Aldrich v. Drury, 8 R. I. 534; 5 Am. R. 624.

12 State v. Armell, 8 Kan. 288.

13 Stodghill v. Chicago etc. R. R. Co. 43 Iowa, 26; 22 Am. R. 211; and see Lake Superior etc. R. R. Co. v. Greve, 17 Minn. 322.

14 Lyon v. Gormley, 53 Pa. St. 261; Blake v. Rich, 34 N. H. 282.

- 15 Conn. etc. R. R. Co. v. Holton, 32 Vt. 43.
- 16 Junction R. R. Co. v. Boyd, 8 Phila. 224.
- 17 Giesey v. Chi. etc. Rallw. 4 Ohio St. 308; and see Lance's Appeal, 55 Pa. St. 16.
- 18 Cape Girardeau etc. Gravel Road Co. v. Renfro, 58 Mo. 265.
- 19 Yates v. Van De Bogert, 56 N. Y. 526. Compare Boston etc. R. R. Co. v. Greenbush, 5 Laus. 431.
- 20 Haldeinan v. Penn'a Cent. R. R. 50 Pa. St. 425. And compare Heyward v. Mayor etc. 7 N. Y. 314; Rexford v. Knight, 11 Id. 308; De Varaigne v. Fox, 2 Blatchf. 95.

§ 251. Location of road.—Before proceeding with the construction of a railroad a survey of the route must be made;¹ and the company should define with precision the location and the quantity of land required, in order to show the landowner the extent of the claim made.² Experimental surveys may, however, be made at pleasure, before the final location of the route;³ since the mere experimental survey of a route confers no vested right.⁴ But after the road has been located and constructed between the termini fixed by the charter, the power of the company to select the location is exhausted,⁵ and it cannot be indulged with another choice.⁶ And this is so, although the change sought is not to appropriate the land of an individual, but to use a highway.⁷ The route can be changed only by authority of a legislative act.⁸ Even the power to "maintain" a railroad does not imply a power to change the location after the railroad has been constructed.⁹ But where the charter fixes one terminus of the road at or near a certain point, the company is permitted a large discretion in locating its route,¹⁰ the exercise of which will not be reviewed, unless the company has clearly abused the privilege, or acted in bad faith.¹¹ Generally, all railroad charters must be taken to allow the exercise of such a discretion in the location of a route as is incident to an ordinary practical survey thereof, made with reference to the nature of the country to be passed over, and the obstacles to be encountered or avoided.¹² Where a railroad company was organized by an act of the legislature,

with authority to construct its road between two points, and over certain streets and roads therein named, this was held to constitute a practical location of its route by the legislature, and to dispense with the notice of the location of its route, and of the filing of the map required by the General Railroad Act.¹³ Power in the charter of a railway company to enter a city confers, of necessity, the right to locate the road somewhere, and if need be, upon a street or alley.¹⁴ And a charter authority to build a railroad to a city named, imports an authority to extend the road within the city limits.¹⁵ Power to change the "location" or "route" does not include the power to change the termini.¹⁶ A contract by a railway company to locate depots at a particular point and no other, in a town, is against public policy.¹⁷ A location of the route of a railway, sufficient to fix the liability of subscribers to the stock, may be completed by resolutions, the publication of maps, or by other acts of the directors, manifesting a corporate determination to construct the road over a particular route.¹⁸ But the articles of association of a railway company are superior to a map of its road, and if the two are in conflict, the map must yield.¹⁹ In trespass by a landowner against a railroad company, for entering upon his land, and there constructing its road, the burden of proof is upon the defendant to show that the land is included in the authorized location.²⁰ The fact that a railroad was constructed, and has ever since been in use, and that its location is on the town records, is held to be sufficient proof of location.²¹

1 See *Neal v. Pittsburg etc. R. R. Co.* 2 Grant Cas. 137; *Housatonic R. R. Co. v. Lee etc. R. R. Co.* 118 Mass. 391; *Missouri River etc. R. R. Co. v. Shepard*, 9 Kan. 647.

2 *Strang v. Beloit etc. R. R. Co.* 16 Wis. 635.

3 *Neal v. Pittsburg etc. R. R. Co.* 2 Grant Cas. 137.

4 *Morris etc. R. R. Co. v. Blair*, 1 Stockt. Ch. 635.

5 *Brigham v. Agr. etc. R. R. Co.* 1 Allen, 316; *Morris etc. R. R. Co. v. Central R. R. Co.* 31 N. J. L. 205; and see *Turnpike Co. v. Hbsmer*, 12 Conn. 361; *Beale v. Penn'a R. R. Co.* 86 Pa. St. 509; *Brooklyn Cent. R. R. Co. v. Brooklyn City R. R. Co.* 32 Barb. 358; *Blakemore v. Glamorganshire Canal Co.* 1 Mylne & K. 154. But compare *Miss. etc. R. R.*

Co. v. Devaney, 42 Miss. 555; 2 Am. R. 608; *South Carolina Railw. v. Blake*, 9 Rich. 229; *Easton etc. R. R. Co. v. Greenwich*, 25 N. J. Eq. 565.

6 *Neal v. Pittsburg etc. R. R. Co.* 2 Grant Cas. 137. But see *Miss. etc. R. R. Co. v. Devaney*, 42 Miss. 555; 2 Am. R. 608.

7 *Little Miami R. R. v. Naylor*, 2 Ohio St. 233.

8 *Mason v. Brooklyn etc. R. R. Co.* 35 Barb. 373; *Hudson etc. Canal Co. v. N. Y. etc. R. R. Co.* 9 Paige, 323.

9 *Moorhead v. Little Miami R. R.* 17 Ohio, 340; and see *Atkinson v. Marietta etc. R. R. Co.* 15 Ohio St. 21.

10 *Fall River etc. Co. v. Old Colony etc. R. R. Co.* 5 Allen, 221; and see *Commonw. v. Fitchburg R. R. Co.* 8 Cush. 240; *Commonw. v. Cross Cut R. R. Co.* 53 Pa. St. 62; *Baltimore etc. R. R. Co. v. Wheeling*, 13 Gratt. 40.

11 *Fall River etc. Co. v. Old Colony etc. R. R. Co.* 5 Allen, 221; *Walker v. Mad River etc. R. R. Co.* 8 Ohio, 33; *Southern etc. R. R. Co. v. Stoddard*, 6 Minn. 150; *Cleveland etc. R. R. Co. v. Speer*, 56 Pa. St. 325; *Hentz v. Long Island R. R. Co.* 13 Barb. 646; and see *Att.-Gen. v. Ely etc. Railw. Co.* Law R. 6 Eq. 106; *Auspach v. Railroad Co.* 5 Phila. 491.

12 *Southern Minn. R. R. Co. v. Stoddard*, 6 Minn. 150. And compare *Parker's Appeal*, 64 Pa. St. 137; *Cleveland etc. R. R. Co. v. Stackhouse*, 10 Ohio St. 567.

13 *Matter of Coney Island etc. R. R. Co.* 12 Hun, 451. Compare *Chicago etc. R. R. Co. v. Joliet*, 79 Ill. 25.

14 *Tenn. etc. R. R. Co. v. Adams*, 3 Head, 596. Compare *Hays v. Briggs*, 3 Pittsb. Rep. 504; *Stevens v. Erie R. R. Co.* 21 N. J. Eq. 253.

15 *Rio Grande R. R. Co. v. Brownsville*, 45 Tex. 88; *Moses v. Pittsburg etc. R. R. Co.* 21 Ill. 516; and see *Mohawk Bridge Co. v. Utica etc. R. R. Co.* 6 Paige, 554. But see *North East R. R. Co. v. Payne*, 8 Rich. 177.

16 *Att.-Gen. v. West Wis. Railw. Co.* 36 Wis. 468.

17 *Marsh v. Fairbury etc. Railw. Co.* 64 Ill. 414; 16 Am. R. 564; *St. Louis etc. R. R. Co. v. Mathers*, 71 Ill. 592; 23 Am. R. 123; *St. Joseph etc. R. R. Co. v. Ryan*, 11 Kan. 602; 15 Am. R. 357.

18 *Parker v. Thomas*, 28 Ind. 277.

19 *Mason v. Brooklyn etc. R. R. Co.* 35 Barb. 373.

20 *Hazen v. Boston etc. Railw. Co.* 2 Gray, 574.

21 *Hatch v. Vt. Cent. R. R. Co.* 28 Vt. 142.

§ 252. **Construction contracts.**—A railroad company authorized to build a railroad has no power to contract with an individual to construct a railroad solely for his own use, on a part of the company's route.¹ And the duty of a railway company to construct its road will not be raised by implication from words of permission only in the charter, unless upon a view of the whole statute it was clearly intended to impose the obligation.² But where the company has undertaken to construct its road, the obligation to complete the work is held to be coextensive

with the authority to make the road;³ and an agreement by a railway company not to build a portion of its line, at the instance of a rival line, is held to be void.⁴ In a case of doubt as to whether a railway company will be able to build the main line of its road, and also connecting branches, it may be restrained from wasting its means in constructing the latter.⁵ In New York, the remedy against a railroad company for disusing a part of its road, after completion, is by an action to vacate the charter, or annul the existence of the corporation,⁶ and not an action in equity, on behalf of the people, to enforce a specific performance.⁷ A substantial *bona fide* compliance with the terms of construction contracts may be insisted on,⁸ and a deficient performance is not excused by the fact that the uncompleted portion of the work may be done at a trifling expense.⁹ Provisions in such contracts, that the work shall be done to the satisfaction of a person in the employ of the company, as the company's engineer,¹⁰ may be enforced.¹¹ So a stipulation in such a contract, that a measurement should be made by the engineer of the road, whose decision should be final, renders such measurement conclusive upon the parties;¹² but the contractor is not concluded by measurements made *ex parte*;¹³ nor does such stipulation govern, as to extra work uncalled for by the contract;¹⁴ and if the engineer refuses to measure or estimate the work done, such stipulation does not prevent the contractor from recovering upon other evidence of performance.¹⁵ It is indispensable that the engineer or agent should himself make the admeasurement.¹⁶ He cannot delegate his authority to another.¹⁷ And when the contract contains no express recognition of the conclusiveness of the engineer's estimates, they are to be tested by their correctness.¹⁸ They may be relied on, unless shown to be erroneous.¹⁹ If a contractor fails to finish a railroad within the time fixed by the contract, the measure of damages is the value of the use of the road from the time it should have been com-

pleted under the contract to the time when it is in fact completed.²⁰ A sub-contractor for the construction of part of a railroad cannot recover against the company for extra work performed under his contract with the first contractor.²¹ And in an action against a railway company to recover the value of services rendered prior to the incorporation, in procuring the charter, etc., the plaintiff is not entitled to recover in the absence of proof that a majority of the corporators or promoters of the company authorized the service.²² A railway company will not be restrained from proceeding with the construction of its road because it has violated a contract previously made in relation to it.²³

1 *Stewart's Appeal*, 56 Pa. St. 413.

2 *York etc. Railw. Co. v. Reg.* 1 El. & B. 859; 19 Eng. L. & Eq. 199; and see *Scottish N. E. Railw. Co. v. Stewart*, 3 Macq. 302; *Reg. v. Bristol etc. Railw. Co.* 4 Ad. & E. N. S. 162; *Reg. v. Ambergate Railw. Co.* 17 Id. 362; 1 El. & B. 373; *Great West. R. R. Co. v. Reg.* 18 Eng. L. & Eq. 211. But see *State v. Railroad Co.* 7 Neb. 357.

3 *Cohen v. Wilkinson*, 1 Macn. & G. 481; 12 Beav. 134; *Graham v. Birkenhead etc. Railw. Co.* Id. 460. In deciding whether to enforce specific performance against a railway company, regard must be had to the interests of the public: *Raphael v. Thames Valley Railw. Co.* Law R. 2 Eq. 37. Compare *Att.-Gen. v. Ely etc. Itailw. Co.* Law R. 8 Eq. 106; *Reg. v. Bradford Nav. Co.* 6 Best & Smith, 631; *Hackensack Improvement Co. v. N. J. etc. R. R. Co.* 22 N. J. Eq. 94.

4 *State v. Hartford etc. R. R. Co.* 29 Conn. 438; *Hartford etc. R. R. Co. v. N. Y. etc. R. R. Co.* 3 Robt. 411.

5 *Town of Platteville v. Galena etc. R. R. Co.* 43 Wis. 493. Compare *Bagshaw v. Eastern Union Railw. Co.* 2 Macn. & G. 389.

6 *People v. Albany etc. R. R. Co.* 24 N. Y. 261.

7 *People v. Albany etc. R. R. Co.* 24 N. Y. 261. But see *State v. Hartford etc. R. R. Co.* 29 Conn. 538.

8 *Finegan v. L'Engle*, 8 Fla. 413.

9 *Finegan v. L'Engle*, 8 Fla. 413.

10 *Barker v. Troy etc. R. R. Co.* 27 Vt. 766; *Finegan v. L'Engle* 8 Fla. 413. See *Milner v. Ga. etc. Co.* 4 Ga. 385.

11 *Phelan v. Albany etc. R. R. Co.* 1 Lans. 258; and see *Condon v. South Side R. R. Co.* 14 Gratt. 302; *Cal. North. R. R. Co. v. Butte Co.* 18 Cal. 671; *North Lebanon R. R. Co. v. McGrann*, 33 Pa. St. 530.

12 *McMahon v. N. Y. etc. R. R. Co.* 20 N. Y. 463; *Mitchell v. Kavanagh*, 35 Iowa. 286. But compare *Snell v. Brown*, 71 Ill. 133.

13 *McMahon v. N. Y. etc. R. R. Co.* 20 N. Y. 463; and see *Wilson v. York etc. R. R. Co.* 11 Gill & J. 58.

14 *Starkey v. De Graff*, 22 Minn. 431. Compare *Seymour v. Long Dock Co.* 20 N. J. Eq. 398.

15 *Starkey v. De Graff*, 22 Minn. 431.

16 *Wilson v. York etc. R. R. Co.* 11 Gill & J. 58.

17 *Wilson v. York etc. R. R. Co.* 11 Gill & J. 58.

18 *Memphis etc. R. R. Co. v. Wilcox*, 48 Pa. St. 161.

19 *Memphis etc. R. R. Co. v. Wilcox*, 48 Pa. St. 161; and see *Finegan v. L'Engle*, 8 Fla. 413.

20 *Snell v. Cottingham*, 72 Ill. 161. Compare *Grant v. Savannah etc. R. R. Co.* 51 Ga. 348; *Elizabethtown etc. R. R. Co. v. Geoghegan*, 9 Bush. 54.

21 *Vanderwerker v. Vt. etc. R. R. Co.* 27 Vt. 125; and compare *Herrick v. Belknap*, Id. 573; *Barker v. Troy etc. R. R. Co.* Id. 766.

22 *Bell's Gap R. R. Co. v. Christy*, 79 Pa. St. 54; 21 Am. R. 39. Compare *Rockford etc. R. R. Co. v. Sage*, 65 Ill. 328; *Low v. Conn. etc. R. R. Co.* 45 N. H. 379; *Preston v. Liverpool etc. Railw. Co.* 7 Eng. L. & Eq. 124.

23 *Gallagher v. Fayette etc. R. R. Co.* 39 Pa. St. 40. A railroad is subject to coercive sale only as a whole: *Applegate v. Ernst*, 3 Bush, 650; and therefore a mechanic's lien will not lie against bridges, culverts, trestles, etc., of a railroad: *Graham v. Railroad Co.* 14 Bush, 425; 29 Am. R. 413.

§ 253. Fencing line of road.—A railway company is not bound at common law to fence its track, so as to prevent cattle from straying thereon,¹ unless in fulfillment of some special agreement, either sealed or unsealed.² Nor, in the absence of a statute specially imposing the obligation, does a railway company incur any liability for neglect to make cattle-guards at private crossings.³ But at common law, a railway company is bound to use every reasonable care to prevent cattle from straying on the line of its road;⁴ and is bound, as between it and its passengers, to assume risks of injury to them from neglect to do so.⁵ And where cattle are upon the track, whether lawfully or unlawfully, and are injured or killed through the inexcusable negligence of the company's servants, the company is liable.⁶ Railway companies are now generally required by the terms of their charters, or by positive statutory enactment, to fence their tracks, and to provide sufficient cattle-guards at all farm and road crossings;⁷ in default of which, the company is made responsible for all injuries inflicted by its agents or engines upon animals, whether by negligence or not.⁸ Such statutory enactments are in the nature of police regulations, designed to promote the security of persons and property passing upon the road,⁹ and are constitutional

and valid.¹⁰ And they may be made obligatory upon a company, whether chartered before or after their passage.¹¹ The duty to erect involves the duty to *maintain* fences and cattle-guards required by the statute.¹² But only ordinary and reasonable care and diligence in this respect are required;¹³ and the company will be allowed a reasonable time within which to make repairs.¹⁴ The obligation to fence takes effect as soon as the company opens the fields of an adjoining landowner for the purpose of constructing its road;¹⁵ and the liability of the company extends to all kinds of animals that would be kept from the track by an ordinary fence.¹⁶ A requirement to fence against "cattle, horses, sheep, and hogs" includes asses¹⁷ and mules.¹⁸ But the company need not fence against dogs.¹⁹ A requirement that the company shall fence "either or both" sides of its property, means either or both, as occasion may demand;²⁰ and a requirement to keep its road "securely fenced" includes the duty to construct and keep in repair proper cattle-guards on each side of highways crossing its track.²¹ A requirement to keep cattle-guards at "road" crossings applies to a street crossing in a village or city.²² In most of the states of the Union, the benefit of statutes requiring railway companies to fence their roads, extends to all owners of cattle, though not adjoining proprietors, and although it does not appear how and whence the cattle came upon the road.²³ But in some of the states, and in England, the rule is otherwise;²⁴ and the company is not bound to fence against cattle straying upon a highway running next to and parallel with the railroad;²⁵ though it may be liable with respect to cattle lawfully passing along the highway.²⁶ If cattle stray upon the track of a railroad at a point where it is not required to be fenced, and are killed, the owner cannot recover without showing negligence on the part of the company.²⁷ And contributory negligence may defeat an action for an injury arising from neglect of a railway company to keep in repair a

fence once built.²⁸ An adjoining landowner who has received from the company compensation for maintaining fences himself, cannot recover for injuries to cattle occasioned by defects therein.²⁹ But a contract by the landowner with the company, to keep in repair fences between his land and the road, does not release the company from its liability to others than the owner.³⁰

1 *Tonawanda R. R. Co. v. Munger*, 5 Denio, 255; *Toledo R. R. Co. v. Wickery*, 44 Ill. 76; *Knight v. New Orleans etc. R. R. Co.* 15 La. An. 105; *Vandergrift v. Del. R. R. Co.* 2 *Houst.* 287; *Memphis etc. R. R. Co. v. Orr*, 43 Miss. 279.

2 *Vandergrift v. Del. R. R. Co.* 2 *Houst.* 287; and see *Fernon v. Dubuque etc. R. R. Co.* 22 Iowa, 528; *Louisville etc. R. R. Co. v. Milton*, 14 Mon. 11, 75.

3 *Bartlett v. Dubuque etc. R. R. Co.* 20 Iowa, 188.

4 *Buxton v. North Eastern Railw. Co.* Law R. 3 Q. B. 549.

5 *Lackawanna etc. R. R. Co. v. Chenewith*, 52 Pa. St. 382.

6 *Louisville etc. R. R. Co. v. Ballard*, 2 Met. (Ky.) 177; *Trout v. Va. & Tenn. R. R. Co.* 23 Gratt. 619; *Indianapolis etc. R. R. Co. v. Caldwell*, 9 Ind. 357; *Cleveland v. Chicago etc. R. R. Co.* 35 Iowa, 220; and compare *McCoy v. California etc. R. R. Co.* 40 Cal. 532; *Galpin v. Chicago etc. R. R. Co.* 19 Wis. 604; *Quimby v. Vt. Cent. R. R.* 28 Vt. 387. The burden of proof is upon the plaintiff to show want of ordinary care on the part of the company or its servants; *Schrier v. Chicago etc. R. R. Co.* 40 Iowa, 357; *Mobile etc. R. R. Co. v. Hudson*, 50 Miss. 572. Compare *Mobile etc. R. R. Co. v. Williams*, 53 Ala. 555; *Roof v. Railroad Co.* 4 So. Car. 61; *Chicago etc. R. R. Co. v. Kellam*, 92 Ill. 245; 34 Am. R. 128.

7 See *Suydam v. Moore*, 8 Barb. 358; *New Albany etc. R. R. Co. v. Tilton*, 12 Ind. 3; *Pittsburgh etc. Railw. Co. v. Methven*, 21 Ohio St. 586; *Buxton v. North Eastern Railw. Co.* Law R. 3 Q. B. 549; *Jones v. Seligman*, 81 N. Y. 190.

8 *Fauning v. Long Island R. R. Co.* 2 *Thomp. & C.* 585; *Staats v. Hudson River R. R. Co.* 4 Abb. N. Y. App. 237; 3 *Keyes*, 196; 33 *How. Pr.* 139; *Purdy v. N. Y. etc. R. R. Co.* 61 N. Y. 353; *Jeffersonville etc. R. R. Co. v. Ross*, 37 Ind. 545; *Gorman v. Pacific R. R. Co.* 26 Mo. 441; *Norris v. Androscoggin R. R. Co.* 39 Me. 273; and compare *Chicago etc. R. R. Co. v. Umphenour*, 69 Ill. 198; *Spence v. Chicago etc. R. R. Co.* 25 Iowa, 139; *Morris v. St. Louis etc. R. R. Co.* 58 Mo. 78.

9 *Staats v. Hudson River R. R. Co.* 4 Abb. N. Y. App. 287; 33 *How. Pr.* 139; 3 *Keyes*, 196; *Thorpe v. Rutland etc. R. R. Co.* 27 Vt. 140; *Penn'a R. R. Co. v. Riblet*, 66 Pa. St. 164; *Bulkley v. N. Y. etc. R. R. Co.* 27 Conn. 479; *Wilder v. Maine etc. R. R. Co.* 65 Me. 332; *New Albany etc. R. R. Co. v. Maiden*, 12 Ind. 10; *Jeffersonville etc. R. R. Co. v. Nichols*, 30 Id. 321.

10 *Trice v. Hannibal etc. R. R. Co.* 49 Mo. 438; *Penn'a R. R. Co. v. Riblet*, 66 Pa. St. 164.

11 *Sawyer v. Vt. etc. R. R. Co.* 105 Mass. 196; *Staats v. Hudson River R. R. Co.* 4 Abb. N. Y. App. 287; 33 *How. Pr.* 139; 3 *Keyes*, 196; *Wilder v. Me. etc. R. R. Co.* 65 Me. 332; and see *Purdy v. N. Y. etc. R. R. Co.* 61 N. Y. 353. Whether the lessor of a railroad who has parted with possession can be held liable for the neglect of the lessee to fence, is questioned in *Ditchett v. Spuyten Duyvil etc. R. R.* 67 N. Y. 425. Compare *Tracy v. Troy etc. R. R. Co.* 65 Barb. 529; 38 N. Y. 433; and see, as to the

rule under statutes of different states: *Wyman v. Penobscot etc. R. R. Co.* 46 Me. 163; *Clement v. Canfield*, 28 Vt. 302; *Fort Wayne etc. R. R. Co. v. Hinebaugh*, 43 Ind. 354; *Stephens v. Davenport etc. R. R. Co.* 34 Iowa, 327.

12 *McDowell v. N. Y. Cent. R. R. Co.* 37 Barb. 195; *Spinner v. N. Y. Cent. etc. R. R. Co.* 6 Hun, 600; *Brown v. Milwaukee etc. R. R. Co.* 21 Wis. 39.

13 *Robinson v. Grand Trunk Railw. Co.* 32 Mich. 322; *Ill. Cent. R. R. Co. v. Swearingen*, 47 Ill. 206; *McCormick v. Chicago etc. R. R. Co.* 41 Iowa, 193; *Lemmon v. Chicago etc. R. R. Co.* 32 Id. 151.

14 *Antisdel v. Chicago etc. R. R. Co.* 28 Wis. 145; 7 Am. R. 44; *Toledo etc. R. R. Co. v. Daniels*, 21 Ind. 256; *Wheeler v. Erie Railw. Co.* 2 Thomp. & C. 634; *Davis v. Chicago etc. R. R. Co.* 40 Iowa, 292; and see *Toledo etc. Railw. Co. v. Cohen*, 44 Ind. 444; *Stephenson v. Grand Trunk Railw. Co.* 34 Mich. 323; *Haskings v. St. Louis etc. R. R. Co.* 58 Mo. 302.

15 *Holden v. Rutland etc. R. R. Co.* 30 Vt. 297. Compare *Rockford etc. R. R. Co. v. Heslin*, 65 Ill. 366; *Gilman etc. R. R. Co. v. Spencer*, 76 Ill. 192; *Gardner v. Smith*, 7 Mich. 410; *Clark v. Vt. etc. R. R. Co.* 23 Vt. 103.

16 *Indianapolis etc. R. R. Co. v. Marshall*, 27 Ind. 300; *Tallman v. Syracuse etc. R. R. Co.* 4 Abb. N. Y. App. 351. Compare *Chicago etc. R. R. Co. v. Utley*, 33 Ill. 410; *O'Flaherty v. Union Railw. Co.* 45 Mo. 70; *Schmidt v. Milwaukee etc. Railw. Co.* 23 Wis. 186; *Bessant v. Great West. Railw. Co.* 8 Com. B. N. S. 368.

17 *Ohio etc. R. R. Co. v. Brubaker*, 47 Ill. 463.

18 *Toledo etc. R. R. Co. v. Cole*, 50 Ill. 184.

19 *Wilson v. Wilmington etc. R. R. Co.* 10 Rich. 52.

20 *Walsh v. Virginia etc. R. R. Co.* 8 Nev. 110. Compare *Tredway v. Railroad Co.* 43 Iowa, 527; *Huxton v. Pittsburgh etc. R. R. Co.* 26 Ohio St. 214.

21 *Pittsburgh etc. R. R. Co. v. Eby*, 55 Ind. 567.

22 *Brace v. N. Y. Cent. R. R. Co.* 27 N. Y. 269.

23 See *New Albany etc. R. R. Co. v. Aston*, 13 Ind. 545; *Corwin v. N. Y. etc. R. R. Co.* 13 N. Y. 42; *Purdy v. N. Y. etc. R. R. Co.* 61 Id. 333; *Brown v. Providence etc. R. R. Co.* 12 Gray, 55; *Isbell v. N. Y. etc. R. R. Co.* 27 Conn. 393.

24 See *Giles v. Boston etc. R. R. Co.* 55 N. H. 552; *Demis v. Conn. etc. R. R. Co.* 42 Vt. 375; 1 Am. R. 339; *Ellis v. Pacific R. R.* 55 Mo. 273; *Marfell v. South Wales etc. R. R. Co.* 8 Com. B. N. S. 525.

25 *Eames v. Salem etc. R. R. Co.* 98 Mass. 560; *Towns v. Cheshire R. R. Co.* 21 N. H. 363; *Jackson v. Rutland etc. R. R. Co.* 25 Vt. 150; *Ricketts v. East India etc. Railw. Co.* 12 Com. B. 160. Compare *Sawyer v. Vt. etc. R. R. Co.* 105 Mass. 196.

26 *Midland Railw. Co. v. Daykin*, 17 Com. B. 126; *Manchester Railw. Co. v. Wallis*, 14 Id. 243; 25 Eng. L. & Eq. 373.

27 *Indianapolis etc. R. R. Co. v. Christy*, 43 Ind. 143; *Swearingen v. Mo. etc. R. R. Co.* 64 Mo. 73; and see *Jeffersonville etc. R. R. Co. v. Underhill*, 43 Ind. 389; *Brady v. Reussalaer etc. R. R. Co.* 1 Hun. 37; 3 Thomp. & C. 537; *Flint etc. R. R. Co. v. Lull*, 28 Mich. 510; *Robertson v. Atlantic etc. R. R. Co.* 64 Mo. 412; *Latty v. Burlington etc. R. R. Co.* 33 Iowa, 250; *Peoria etc. R. R. Co. v. Barton*, 80 Ill. 72; *Roberts v. Great Western Railw. Co.* 4 Com. B. N. S. 506.

28 *Chicago etc. R. R. Co. v. Seirer*, 60 Ill. 295; *Jones v. Sheboygan etc. R. R. Co.* 42 Wis. 306. Compare *Trow v. Vt. Cent. R. R. Co.* 24 Vt. 467;

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Peoria etc. R. R. Co. v. Champ, 75 Ill. 577; Shepard v. Buffalo etc. R. R. Co. 33 N. Y. 641.

29 Terre Haute etc. R. R. Co. v. Smith, 16 Ind. 102; Warren v. Keokuk etc. R. R. Co. 41 Iowa, 484; Duffy v. N. Y. etc. R. R. Co. 2 Hill, 494. See Cin. etc. R. R. Co. v. Bidge, 54 Ind. 39; Gill v. Atlantic etc. R. R. Co. 27 Ohio St. 240.

30 Warren v. Keokuk etc. R. R. Co. 41 Iowa, 484; and compare New Albany etc. R. R. Co. v. Malden, 12 Ind. 10.

§ 254. Highway crossings.—If a railway company constructs its road across a highway without lawful authority,¹ or in a manner not authorized by law,² the road is a nuisance, and the company is liable to indictment.³ And where a railway company is authorized to construct its line across a highway, it must be done with the least possible inconvenience to the public;⁴ and it is the duty of the company to keep the crossing in a safe condition.⁵ The company will be held liable for all unnecessary obstructions, by stopping trains or otherwise, at crossings;⁶ and it is liable to a city for the damages which the latter has been compelled to pay by reason of a defect in a street, caused by a railroad crossing not properly constructed or maintained.⁷ Nor is it relieved of the obligation to keep a crossing in a safe condition, because of a slight deflection in the highway by the proper authorities, whereby the precise place of crossing was changed.⁸ If a railway company constructs a bridge over a crossing, it is the duty of the company to maintain the same in repair;⁹ and this duty extends to the approaches to the bridge, as a part thereof, connecting it with the highway.¹⁰ Neither the public nor the railway company have an exclusive right of passage at a crossing, but their rights are concurrent;¹¹ and reasonable care and prudence must be exercised by each, so as not to interfere unnecessarily with the other.¹² The duty of making a signal on approaching a crossing is imposed upon railroad companies;¹³ but it is equally the duty of a person crossing a railway track to be on his guard against danger to himself and to his property.¹⁴ Running trains at an excessive rate of speed at crossings is held to be negligence;¹⁵ and if a

collision is caused thereby the company is liable.¹⁶ And if a railway company has created extra danger at a crossing, as where it is made necessary for passengers to cross the track in passing to and from its depot to its trains,¹⁷ the company is bound to use extra precautions, and such as are adequate to insure the safety of every passenger exercising ordinary care.¹⁸ If a railway company lays its tracks in a street or public highway, it is bound to lay them in a proper manner, and to put and maintain the street or highway in as good repair as it was before;¹⁹ and for a failure in either of these respects, the company is liable.²⁰ In restoring a highway across which its road has been constructed, the company has power to take lands for the purpose.²¹

1 Commonw. v. Vt. etc. R. R. 4 Gray, 22.

2 Commonw. v. Nashua etc. R. R. 2 Gray, 54.

3 Commonw. v. Vt. etc. R. R. 4 Gray, 22; Commonw. v. Erie etc. R. R. 29 Pa. St. 339. Compare Commonw. v. Hartford etc. R. R. 14 Gray, 379.

4 Louisville etc. R. R. Co. v. State, 3 Head, 523; Commonw. v. Erie etc. R. R. 27 Pa. St. 333; Queen v. Sharpe, 3 Eng. Railw. Cas. 27.

5 Pittsburg etc. R. R. Co. v. Dunn, 56 Pa. St. 230; Gale v. N. Y. Cent. R. R. Co. 76 N. Y. 514; Farley v. Railroad Co. 42 Iowa, 234; and see State v. Wilmington etc. R. R. Co. 74 No. Car. 143.

6 Murray v. South Car. R. R. Co. 10 Rich. 227; Jonesville v. Milwaukee etc. R. R. Co. 7 Wis. 434; Veazie v. Penobscot R. R. Co. 49 Me. 119.

7 Portland v. Atlantic etc. R. R. Co. 66 Me. 435. See also Woburn v. Boston etc. R. R. Co. 109 Mass. 283; Snow v. Housatonic R. R. Co. 8 Allen, 441.

8 People v. Chicago etc. R. R. Co. 67 Ill. 118. Compare Brookins v. Central etc. R. R. Co. 48 Ga. 523.

9 Roe v. Elmendorf, 52 How. Pr. 232.

10 Hayes v. N. Y. etc. R. R. Co. 9 Hun, 63; People v. N. Y. etc. R. R. Co. 74 N. Y. 302.

11 Pennsylvania Co. v. Krick, 47 Ind. 363; North Penn'a R. R. Co. v. Helleman, 49 Pa. St. 60. That the public use is subordinate to the right of the company to use its road: see Ogle v. Phila. etc. R. R. Co. 3 Howst. 267. Where the road of one railway company crosses that of another, the rights of the former are made subordinate to those of the latter: Pittsburg etc. R. R. Co. v. South-west etc. Railw. Co. 77 Pa. St. 172.

12 Pittsburg etc. R. R. Co. v. Maurer, 21 Ohio St. 421; Toledo etc. R. R. Co. v. Shuckman, 50 Ind. 42; Gorton v. Erie Railw. Co. 45 N. Y. 660.

13 Murray v. South Car. R. R. Co. 10 Rich. 227; Indianapolis etc. R. R. Co. v. Stables, 62 Ill. 313; Pittsburg etc. R. R. Co. v. Dunn, 56 Pa. St. 230; Continental Impr. Co. v. Stead, 95 U. S. 161.

14 Penn'a R. R. Co. v. Beale, 73 Pa. St. 504; 13 Am. R. 753; Chicago

etc. R. R. Co. v. Hatch, 79 Ill. 137; *Stabley v. London etc. Railw. Co.* 4 Harl. & N. 33; *Law R.* 1 Ex. 13.

15 *Massoth v. Del. etc. Canal Co.* 64 N. Y. 534; and see *Artz v. Railroad Co.* 41 Iowa, 234. But compare *Warner v. N. Y. etc. R. R. Co.* 44 N. Y. 465; *Maher v. Atlantic etc. R. R. Co.* 64 Mo. 257; *Zeigler v. Railroad Co.* 5 So. Car. 231; *Sharrod v. London etc. Railw. Co.* 4 Ex. 530.

16 *Massoth v. Del. etc. Canal Co.* 64 N. Y. 524. Compare *Eaton v. Erie Railw. Co.* 51 N. Y. 545; *Robinson v. Western Pacif. R. R. Co.* 48 Cal. 409.

17 See *Klein v. Jewett*, 26 N. J. Eq. 474.

18 *Klein v. Jewett*, 26 N. J. Eq. 474.

19 *Gear v. Railw. Co.* 43 Iowa, 83; *Worster v. Forty-second St. etc. R. R. Co.* 50 N. Y. 203; *Gale v. N. Y. Cent. etc. R. R. Co.* 78 Id. 394.

20 *Kellinger v. Forty-second St. etc. R. R. Co.* 50 N. Y. 206; *Gear v. Railway Co.* 43 Iowa, 83; and see *Tobin v. Portland etc. R. R. Co.* 59 Me. 133; *Balt. etc. R. R. Co. v. Boteler*, 33 Md. 538.

21 *People v. Dutchess etc. R. R. Co.* 58 N. Y. 152.

§ 255. Liability for injuries in constructing road.

—As a general rule, a railway company incurs no liability for consequential damages sustained by a neighboring landowner from the construction of its road, if built in a skillful and proper manner, and within the exercise of the power granted;¹ but for injuries sustained from the negligent and improper construction of its road, the company may be held liable.² If a railway company rightfully and properly diverts a natural stream or water-course, securing its banks in a reasonable manner, it cannot afterward be held liable for the future action of the water.³ But it may be held liable in damages for obstructing the natural flow of the surface water, by any artificial means, thereby forcing it, in an increased quantity, upon the lands of another, to his injury.⁴ So the company is liable if, without necessity, it discharges water from springs opened by it in the construction of its road upon land of another outside of its location.⁵ So where a bridge-pier was built in a way to turn the current in time of freshets upon one's grass land, causing gullies and silt deposits, and it appeared that at an additional expense the bridge could have been erected without causing such injury, the company was held liable.⁶ And a railway company may be held liable for obstructing the free flow of water from a mill, by the

erection of a bridge or other necessary structure below the mill.⁷ And the duty of a railway company to restore a stream of water, crossed in the line of its road, to its former state, or such state as not to impair its usefulness, applies to unnavigable as well as to navigable streams.⁸ Property owners, on a street through which a railroad extends, must suffer many inconveniences, such as detention by trains, annoyance from noise, the frightening of horses, danger to persons crossing the track, etc., for which they cannot recover in a suit for damages.⁹ Nor is a railway company liable for injuries occasioned by its buildings being blown down by storms, if it has used such care and skill in their structure and maintenance as men of ordinary prudence and skill usually employ.¹⁰ The prospective diminution in value of a mill near the line of a proposed railroad, by making it unsafe to drive horses to the mill, and dangerous for persons to reach it, entitles the mill owner to damages.¹¹ And where a railway company erected works not required for the construction of its line on part of its land close to the plaintiff's place of business, who complained of the injury and annoyance from the noise and vibration, an injunction was granted accordingly.¹² The measure of damages in an action against a railway company, for unlawfully excavating and removing soil for the construction of its road, is the amount of the diminution in the value of the property so injured.¹³ But the taking of soil for such purpose will not be presumed to be tortious, if the circumstances can be construed to import the owner's consent thereto.¹⁴

1 *Mazetti v. N. Y. etc. R. R. Co.* 3 *Smith, E. D.* 98; *Aldrich v. Cheshire R. R. Co.* 21 *N. H.* 339; *Mason v. Kennebec etc. R. R. Co.* 31 *Me.* 213; *Slatten v. Des Moines Valley R. R. Co.* 23 *Iowa*, 154; 4 *Am. R.* 295; *Hoser v. Kansas City etc. R. R. Co.* 60 *Mo.* 329; *Koelmel v. New Orleans etc. R. R. Co.* 27 *La. An.* 442. But compare *Brown v. Cayuga etc. R. R. Co.* 12 *N. Y.* 436; *Balt. etc. R. R. Co. v. Reaney*, 42 *Md.* 117; *Lawrence v. Great North. Railw. Co.* 16 *Ad. & E. N. S.* 643.

2 *Southside R. R. Co. v. Daniel*, 20 *Gratt.* 344; *Perley v. Railroad Co.* 57 *N. H.* 212; *Delaplaine v. Chicago etc. Railw. Co.* 42 *Wis.* 214; *Fowle v. New Haven etc. R. R. Co.* 112 *Mass.* 334; 17 *Am. R.* 106.

3 *Norris v. Vt. etc. R. R. Co.* 23 Vt. 29; and compare *Henry v. Vt. etc. R. R. Co.* 30 Id. 638; *Fowle v. New Haven etc. R. R. Co.* 112 Mass. 334; 17 Am. R. 104.

4 *Toledo etc. Railw. Co. v. Morrison*, 71 Ill. 616; *Raleigh etc. R. R. Co. v. Wicker*, 74 No. Car. 230; *Farrot v. Cin. etc. R. R. Co.* 10 Ohio St. 324; *Louisville etc. R. R. Co. v. Hodge*, 6 Bush, 141. Compare *Munkers v. Kansas City etc. R. R. Co.* 60 Mo. 334; *Houston etc. R. R. Co. v. Parker*, 50 Tex. 330; *Short v. Balt. etc. Railw. Co.* 50 Md. 73; 33 Am. R. 298.

5 *Curtis v. Eastern R. R. Co.* 98 Mass. 428.

6 *Spencer v. Hartford etc. R. R. Co.* 10 R. I. 14.

7 *Blood v. Nashua etc. R. R. Co.* 3 Gray, 137; *Henry v. Vt. etc. R. R. Co.* 30 Vt. 638. Compare *Robinson v. N. Y. etc. R. R. Co.* 27 Barb. 512.

8 *Chicago etc. R. R. Co. v. Moffit*, 75 Ill. 524; and see *Miss. etc. R. R. Co. v. Mason*, 51 Miss. 234; *Freeland v. Penn'a R. R. Co.* 66 Pa. St. 91.

9 *Crosby v. Owenboro etc. R. R. Co.* 10 Bush, 298; *Stone v. Fairbury etc. R. R. Co.* 64 Ill. 394; 18 Am. R. 556; *Thompson v. Milwaukee etc. R. R. Co.* 27 Wis. 83; *Colorado Cent. R. R. Co. v. Mollandin*, 4 Colo. 154; *Struthers v. Dunkirk etc. R. R. Co.* 87 Pa. St. 282.

10 *Pittsburg etc. R. R. Co. v. Bingham*, 29 Ohio St. 364; S. C. 23 Am. R. 751.

11 *Western Penn'a R. R. Co. v. Hill*, 56 Pa. St. 460.

12 *Fenwick v. East London Railw. Co.* Law R. 20 Eq. 544.

13 *Karst v. St. Paul etc. R. R. Co.* 22 Minn. 118.

14 *Sweetser v. Boston etc. R. R. Co.* 66 Me. 583.

§ 256. Liability for acts of officers and agents.—

A railway company necessarily acts through the instrumentality of its officers and agents, and is liable for all their acts within the range of its charter powers.¹ It is even liable for the willful torts of its agents committed within the general scope of their employment.² And where its servants, while in the discharge of their duties, pervert the appliances of the company to wanton and malicious purposes to the injury of others, the company is liable therefor;³ and the fact that the act from which the injury resulted was not authorized by the charter is no defense, if the company explicitly recognized the act as done in its business.⁴ The general superintendent is the immediate representative of the company,⁵ and the company is liable for an injury resulting from his negligence in giving an improper order, the same as if such order had emanated directly from an act of the company in its corporate capacity.⁶ So it is held to be within the

general powers of the superintendent to bind the company to pay for medical attendance bestowed at his request on a servant of the company injured in the discharge of his duty upon the road.⁷ But a station agent or conductor is not presumed to be authorized to so bind the company;⁸ though slight evidence will be sufficient to show such authority.⁹ And station agents are presumed to have authority to contract in behalf of their companies for the transportation of freight.¹⁰ Services rendered by the superintendent, at the request of the company, though not strictly within the sphere of his duties, will be presumed to have been rendered in his capacity as superintendent.¹¹ And so of services rendered under like circumstances by the president.¹² In respect to contracts and dealings involving property in which the company is interested, a director stands upon the same footing as an ordinary trustee.¹³ He is bound to act as the representative and for the benefit of the company.¹⁴ He cannot, therefore, be individually interested in a contract for the construction of the road,¹⁵ nor acquire for himself property which it is his duty to acquire for the company;¹⁶ and if he makes a contract on behalf of the company in which he reserves a private interest, or in which he subsequently becomes interested, the company may declare the contract void.¹⁷ A railway company was held to be affected by the illegal conduct of its president, in procuring, by an oppressive exercise of his powers, donations of property to him in trust for the company;¹⁸ the effect of which was, that he held the property in trust for the donors, and not the company.¹⁹ A railway company is not liable for the acts or negligence of another, unless the relation of master and servant, or principal and agent, exist between them.²⁰ Thus, if the company lets by contract the entire construction of its road, reserving no control over those employed in the work, it cannot be held liable for injuries to third persons occasioned by the negligent acts of the workmen; such, for instance, as

blasting in such a careless way as to throw rocks upon the lands of another.²¹ Nor is the company liable for damages resulting from negligence in the management of one of its trains, while being used and controlled by contractors in the construction of a portion of its road, under a contract with the company.²² And a special receiver or assignee of the property of a railway company, appointed in involuntary bankruptcy proceedings, is not an agent or servant of the company, so as to render the company liable for damages occasioned by his negligence while operating the road.²³

1 Washburn v. Nashville etc. R. R. Co. 3 Head, 638; Lackawanna etc. R. R. Co. v. Chenewith, 32 Pa. St. 323; Noyes v. Rutland etc. R. R. Co. 37 Vt. 110; Sherman v. Rochester etc. R. R. Co. 15 Barb. 574; Hays v. Houston etc. R. R. Co. 46 Tex. 772; Baltimore etc. R. R. Co. v. Blocher, 27 Md. 277; Harper v. Indianapolis etc. R. R. Co. 47 Mo. 567; 4 Am. R. 353; Ackerson v. Erie Railw. Co. 32 N. J. L. 254; Hobbit v. Loudon etc. Railw. 4 Ex. 255; Queen v. Birmingham etc. Railw. 3 Ad. & E. N. S. 223; and see Beattie v. Lord Ebury, Law R. 7 Ch. App. 777.

2 Indianapolis etc. Railw. Co. v. Anthony, 43 Ind. 183; and see Terre Haute etc. R. R. Co. v. Graham, 46 Id. 239; Rounds v. Del. etc. R. R. Co. 64 N. Y. 129; 21 Am. R. 597; Peebles v. Patapsco Guano Co. 77 No. Car. 233. Compare De Camp v. Miss. etc. R. R. 13 Iowa, 348; New Orleans etc. R. R. Co. v. Burke, 53 Miss. 701.

3 Peck v. N. Y. etc. R. R. Co. 8 Hun, 286; Chicago etc. R. R. Co. v. Dickson, 63 Ill. 151; 14 Am. R. 114.

4 Hutchinson v. Western etc. R. R. Co. 6 Helsk. 634.

5 See Toledo etc. R. R. Co. v. Rodrigues, 47 Ill. 188; Conn. River R. R. Co. v. Williston, 16 Gray, 64; People v. Stockton etc. R. R. Co. 49 Cal. 415; Cook v. Hannibal etc. R. R. Co. 63 Mo. 397.

6 Washburn v. Nashville etc. R. R. Co. 3 Head, 638.

7 Toledo etc. R. R. Co. v. Rodrigues, 47 Ill. 188; Walker v. Great Western R. R. Co. Law R. 2 Ex. 228; and see Atlantic etc. R. R. Co. v. Reinsner, 18 Kan. 458; Toledo etc. R. R. Co. v. Prince, 50 Ill. 26. But compare Marquette etc. R. R. Co. v. Taft, 28 Mich. 299; Shriver v. Stevens, 12 Pa. St. 258.

8 Tucker v. St. Louis etc. Railw. Co. 54 Mo. 177; Cox v. Midland Counties Railw. 3 Ex. 268; and see Ohio etc. R. R. Co. v. Hatton, 68 Ind. 12.

9 Cairo v. Mahoney, 83 Ill. 173.

10 Deming v. Grand Trunk R. R. Co. 48 N. H. 455; Pruitt v. Hannibal etc. R. R. Co. 62 Mo. 527; and see Armour v. Mich. Cent. R. R. Co. 65 N. Y. 111. But compare Baltimore etc. R. R. Co. v. Wilkens, 44 Md. 11.

11 Bee v. San Francisco etc. R. R. Co. 46 Cal. 248.

12 Cheeney v. Lafayette etc. R. R. Co. 68 Ill. 570; Levisse v. Shreveport City R. R. Co. 27 La. An. 641.

13 Blake v. Buffalo Creek R. R. Co. 56 N. Y. 485; and see Cumberland Coal etc. Co. v. Parish, 42 Md. 596; Conners of Tippecanoe v. Reynolds, 44 Ind. 509.

14 Blake v. Buffalo Creek R. R. Co. 56 N. Y. 485.

- 15 *European etc. Railw. Co. v. Poor*, 59 Me. 277.
- 16 *Blake v. Buffalo Creek etc. R. R. Co.* 56 N. Y. 495; and compare *Hoyle v. Plattsburg etc. R. R. Co.* 54 Id. 314; 13 Am. R. 595; *Covington etc. R. R. Co. v. Bowler*, 9 Bush, 468.
- 17 *Gilman etc. R. R. Co. v. Kelly*, 77 Ill. 426.
- 18 *Union Pacif. R. R. Co. v. Durant*, 3 Dill. 343.
- 19 *Union Pacif. R. R. Co. v. Durant*, 3 Dill. 343.
- 20 See *Meador v. Railroad Co.* 50 Tex. 87; *Allen v. Willard*, 57 Pa. St. 374; *Haus v. Phila. etc. Steamship Co.* 84 Id. 269; 32 Am. R. 462.
- 21 *McCafferty v. Spuyten Duyvil etc. R. R. Co.* 61 N. Y. 178; 48 How. 44; 15 Am. R. 257.
- 22 *Cunningham v. International R. R. Co.* 51 Tex. 503; 32 Am. R. 632; *Union Pacif. R. R. Co. v. Hause*, 1 Wy. Ter. 27; *Meyer v. Midland Pacif. R. R. Co.* 2 Neb. 319; *Kansas etc. Railw. Co.* 18 Kan. 34. See also *Thompson v. New Orleans etc. Railw.* 10 La. An. 403; *Carman v. Steubenville etc. Railw.* 4 Ohio St. 359; *Kansas etc. Railw. Co. v. Fitzsimmons*, 18 Kan. 34; *Shoemaker v. Kingsbury*, 13 Wall. 369; *Railroad Co. v. Hauning*, 15 Id. 649.
- 23 *Metz v. Buffalo etc. R. R. Co.* 58 N. Y. 61; 17 Am. R. 201. Compare *Meara v. Holbrook*, 20 Ohio St. 137; 5 Am. R. 633; *Henderson v. Walker*, 55 Ga. 481; *Cardot v. Barney*, 63 N. Y. 281; 20 Am. R. 533.

§ 257. Are common carriers.—Railway companies are common carriers;¹ and the same is true of express companies, as their business is ordinarily conducted.² In consideration of its franchise and right of way, a railway company owes to the state the duty of impartially receiving and transporting merchandise offered by all persons,³ to the extent of the quantity ordinarily sent over the road.⁴ But it is not bound to receive merchandise for transportation which, by reason of an unusual and unexpected pressure of business, it cannot transport promptly;⁵ and although it cannot, in general, discriminate between persons,⁶ it is not bound to receive an unusual number of passengers, beyond the number it might reasonably be required to provide for.⁷ And a railway company may limit its liability as a common carrier, by a special contract to that effect;⁸ provided such stipulation for exemption from responsibility be just and reasonable in the eye of the law.⁹ In New York, a railway company may stipulate for exemption from liability for losses occurring even through its own negligence or that of its servants.¹⁰ And such was the English rule until modified by statute.¹¹ But the prevailing doctrine in the United

States is, that the company cannot lawfully limit its liability, by notice or special contract, so as to exonerate itself from responsibility for its own negligence or misfeasance, or that of its servants and agents;¹² though it may lawfully limit its common law liability as insurer.¹³

1 Chicago etc. R. R. Co. v. Thompson, 19 Ill. 578; and see Pallentine v. North Mo. R. R. Co. 40 Mo. 491; Michaels v. N. Y. Cent. R. R. Co. 30 N. Y. 564; Fuller v. Naugatuck R. R. 21 Conn. 557; Machee v. London etc. Railw. Co. 2 Ex. 418.

2 U. S. Express Co. v. Backman, 28 Ohio St. 144; Buckland v. Adams Express Co. 97 Mass. 124; Southern Express Co. v. McVeigh, 29 Gratt. 264; Southern Express Co. v. Crook, 44 Ala. 463; Southern Express Co. v. Newby, 36 Ga. 663. Express companies will be treated as common carriers, notwithstanding the declaration in their bills of lading, etc., that they are not to be deemed such: Bank of Ky. v. Adams Express Co. 93 U. S. 114; Christenson v. Am. Express Co. 15 Minn. 270.

3 Union etc. Co. v. Erie Railw. Co. 37 N. J. L. 23; Rogers Locomotive etc. Works v. Erie Railw. Co. 20 N. J. Eq. 379; Keeney v. Grand Trunk etc. R. R. Co. 47 N. Y. 525; Chicago etc. R. R. Co. v. People, 67 Ill. 11; 16 Am. R. 530; Wheeler v. San Francisco etc. R. R. Co. 31 Cal. 46; New Eng. Express Co. v. Mo. Cent. R. R. Co. 57 Mo. 188; Messenger v. Penn'a R. R. Co. 37 N. J. L. 531; 19 Am. R. 754; 13 Id. 457; McDuffee v. Railroad, 52 N. H. 730. A railway may become a common carrier of goods without being obliged to become a common carrier of money or bank-bills: Railroad Co. v. Thompson, 19 Ill. 578; Kuter v. Mich. etc. R. R. Co. 1 Miss. 35; Lee v. Burgess, 9 Bush, 632; and see Southern Express Co. v. Everett, 57 Ga. 688.

4 Mich. etc. R. R. Co. v. Burrows, 33 Mich. 6.

5 Ill. Cent. R. R. v. Cobb, 64 Ill. 128; Great Western R. R. Co. v. Burns, 60 Id. 284; Faulkner v. South Pacif. R. R. Co. 51 Mo. 311.

6 See Beekman v. Saratoga etc. R. R. 3 Paige, 45; Elmore v. Sands, 54 N. Y. 512; Indianapolis etc. R. R. Co. v. Rhoad, 46 Ind. 233; Railroad Co. v. Brown, 17 Wall. 445; Chicago etc. Railw. Co. v. Williams, 55 Ill. 185; 8 Am. R. 641; Hawcroft v. Great North Railw. Co. 8 Eng. L. & Eq. 362.

7 Evansville etc. R. R. Co. v. Duncan, 28 Ind. 441; and see Ill. etc. R. R. Co. v. Demars, 44 Ill. 292.

8 Bissell v. N. Y. etc. R. R. Co. 25 N. Y. 442; McMillan v. Mich. etc. R. R. Co. 16 Mich. 79; Mobile etc. R. R. Co. v. Weiner, 49 Miss. 725; Kimball v. Rutland etc. R. R. Co. 26 Vt. 256; Slim v. Northern Railw. Co. 14 Conn. B. 647; Walker v. York etc. Railw. Co. 3 Car. & K. 279.

9 New York Cent. R. R. Co. v. Lockwood, 17 Wall. 357; 10 Am. R. 366; and compare Menzell v. Railw. Co. 1 Dill. 531; Ohio St. Railw. Co. v. Selby, 47 Ind. 471; 17 Am. R. 719; Babcock v. Lake Shore etc. R. R. Co. 49 N. Y. 491.

10 Poucher v. N. Y. etc. R. R. Co. 49 N. Y. 263; 10 Am. R. 364; Mynard v. Syracuse etc. R. R. Co. 7 Hun, 399; Nicholas v. N. Y. etc. R. R. Co. 4 Id. 327; 6 Thomp. & C. 606. Compare Wescott v. Fargo, 61 N. Y. 542; 19 Am. R. 300.

11 See 17 and 18 Vict. ch. 31, § 7; London etc. Railw. Co. v. Dunham, 18 Com. B. 826; Peek v. North Staffordshire Railw. Co. 10 H. L. Cas. 473.

12 Knowlton v. Erie Railw. Co. 19 Ohio St. 260; 2 Am. 395; Ohio etc. Railw. Co. v. Selby, 47 Ind. 471; 17 Am. R. 719; Adams Express Co. v.

Stettaners, 61 Ill. 194; 14 Am. R. 57; Southern Express Co. v. Cook, 44 Ala. 483; Empire Transp. Co. v. Wamsutta Oil Co. 63 Pa. St. 14; 3 Am. R. 515; Rose v. Des Moines Valley Railw. Co. 39 Iowa, 246; School Dist. etc. v. Boston etc. R. R. Co. 102 Mass. 552; Nashville etc. R. R. Co. v. Johnson, 6 Helsk. 271; New Orleans Mut. Ins. Co. v. New Orleans etc. R. R. Co. 20 La. An. 302; Railroad Co. v. Lockwood, 17 Wall. 357; 10 Am. R. 368.

13 New York Co. v. Central R. R. 3 Wall. 107; Mobile etc. R. R. Co. v. Hopkins, 41 Ala. 436; Filiebrown v. Grand Trunk Railw. Co. 55 Me. 462; Railroad Co. v. Manuf. Co. 16 Wall. 318.

§ 258. Carriage of freight.—Railway companies are insurers of the safe transportation and delivery of the property intrusted to them for carriage,¹ except as against loss or injury caused by the immediate act of God,² or of a public enemy.³ But after a safe delivery of the goods in the proper warehouse of the company, and the consignee has had a reasonable time for taking them away, the liability of the company as carrier ceases, and it will hold the goods as a warehouseman only.⁴ In such case, the company is bound to no more than ordinary care, or such as a man of ordinary prudence would use in respect to his own property placed in like circumstances.⁵ The liability of a common carrier continues, however, until the goods are unloaded;⁶ and if they are destroyed by fire while yet in the car in the freight depot, the company is liable.⁷ It is the duty of the company to provide cars of sufficient strength,⁸ and this rule applies in respect of cars for the carriage of live stock, as well as to those for the carriage of merchandise.⁹ And the fact that the shipper knowingly permits his goods to be packed in an insufficient car does not exempt the company from liability, unless he agrees to assume that risk.¹⁰ But if the shipper personally superintends the loading of the car, the company will not be liable for a loss resulting from its being unskillfully or insufficiently done.¹¹ So the company is relieved from the responsibility of a carrier where chattels perish by natural decay, or the inherent defects of merchandise.¹² And in the carriage of live stock, in the absence of negligence, the company is not liable for such injuries as occur in consequence of the

vitality of the freight;¹³ thus, if one horse inflicts an injury upon another during transportation, the company is not liable, if the injury was caused by the peculiar propensities of the horse to fright, or bad temper, or by the fault of their owner in attaching their halters, or not removing their shoes.¹⁴ A railway company is under no obligation, as a common carrier, to deliver goods at a point beyond or off its own line of road.¹⁵ But such a duty can be created by contract,¹⁶ or by a course of business warranting the presumption that goods will be so delivered;¹⁷ and where the agents of the company fail to deliver goods on demand, within a reasonable time, the company may be held liable for the detention.¹⁸

1 *Chicago etc. R. R. Co. v. Ames*, 40 Ill. 249; *Fitchburg etc. R. R. Co. v. Hanna*, 6 Gray, 639; *Read v. St. Louis etc. R. R. Co.* 60 Mo. 199; *Fruitt v. Hannibal etc. R. R. Co.* 62 Id. 577; *Illinois Cent. R. R. Co. v. Cobb*, 64 Ill. 123; *Kiff v. Old Colony etc. Railw. Co.* 117 Mass. 591; 19 Am. R. 429.

2 *Michaels v. N. Y. etc. R. R. Co.* 30 N. Y. 564; *Chicago etc. Railw. Co. v. Sawyer*, 69 Ill. 285; 18 Am. R. 613; *Condict v. Grand Trunk Railw. Co.* 54 N. Y. 500; *Railroad Co. v. Reeves*, 10 Wall. 176; *Sweetland v. Boston etc. R. R. Co.* 102 Mass. 276.

3 *Phila. etc. R. R. Co. v. Harper*, 29 Md. 330; *Jackson v. Sacramento etc. R. R. Co.* 23 Cal. 268; *Thomas v. Boston etc. R. R. Co.* 10 Met. 472; *Patterson v. North Car. R. R. Co.* 64 No. Car. 147; *Nashville etc. R. R. Co. v. Estis*, 7 Heisk. 622. Compare *Ill. etc. R. R. Co. v. Homberger*, 77 Ill. 467; *Ill. etc. R. R. Co. v. McClellan*, 54 Id. 58; *Porcher v. North-eastern R. R. Co.* 14 Rich. 181.

4 *Mich. etc. R. R. Co. v. Shurtz*, 7 Mich. 511; *Francis v. Dubuque etc. R. R. Co.* 25 Iowa, 60; *New Jersey R. R. Co. v. Penn'a R. R. Co.* 27 N. J. L. 100; *Culbreth v. Phila. etc. R. R. Co.* 3 Houst. 392; *Mohr v. Chicago etc. R. R. Co.* 40 Iowa, 579; *Mobile etc. R. R. Co. v. Prewitt*, 46 Ala. 63; *Derosia v. Winona etc. R. R. Co.* 18 Minn. 133; *Whitney v. Chicago etc. R. R. Co.* 27 Wis. 327. Compare *Hedges v. Hudson River R. R. Co.* 6 Robt. 119; *Railroad Co. v. Maris*, 16 Kan. 333; *South-western R. R. Co. v. Felder*, 46 Ga. 433.

5 *Pike v. Chicago etc. R. R. Co.* 40 Wis. 583. Compare *Brown v. Grand Trunk Railw.* 54 N. H. 535.

6 *Chicago etc. R. R. Co. v. Bensley*, 69 Ill. 630.

7 *Chicago etc. R. R. Co. v. Bensley*, 69 Ill. 630; and see *Central R. R. Co. v. Smith*, 54 Ga. 499; *Winslow v. Vt. etc. R. R. Co.* 42 Vt. 700; *Rice v. Hart*, 118 Mass. 201.

8 *St. Louis etc. Railw. Co. v. Dorman*, 72 Ill. 504; *Sloan v. St. Louis etc. R. R. Co.* 58 Mo. 220.

9 *Indianapolis etc. R. R. Co. v. Allen*, 31 Ind. 394; *Indianapolis etc. Railw. Co. v. Strain*, 81 Ill. 504. As to the duty of railway companies to care for animals in course of transportation: see U. S. Rev. Stat. §§ 4396-4390.

10 *Pratt v. Ordensburg etc. R. R. Co.* 102 Mass. 557. Compare *Lee v. Raleigh etc. R. R. Co.* 72 No. Car. 236; *Illinois Cent. R. R. Co. v. Hall*, 58 Ill. 409.

11 *Ross v. Troy etc. R. R. Co.* 49 Vt. 364; *East Tennessee etc. R. R. Co. v. Whittle*, 27 Ga. 535; *Klauber v. American Express Co.* 21 Wis. 21; *Chicago etc. R. R. Co. v. Shea*, 66 Ill. 471.

12 *Hudson v. Baxendale*, 2 Hurl. & N. 575; and see *Lake Shore etc. R. R. Co. v. Perkins*, 23 Mich. 329; 12 Am. R. 275; *Bankard v. Baltimore etc. R. R. Co.* 34 Md. 197; 6 Am. R. 321.

13 *Cragin v. N. Y. etc. R. R. Co.* 51 N. Y. 61; *Penn. v. Buffalo etc. R. R. Co.* 41 Id. 204; 10 Am. R. 355; *Blower v. Great Western Railw. Co.* Law R. 7 Com. P. 655; *Kendall v. London etc. Railw. Co.* Law R. 7 Ex. 373; *Mich. Southern etc. R. R. Co. v. McDonough*, 21 Mich. 163; 4 Am. R. 468.

14 *Evans v. Fitchburg R. R. Co.* 111 Mass. 142; 15 Am. R. 19.

15 *Cobb v. Railroad Co.* 33 Iowa, 601; *Norway Plains Co. v. Boston etc. R. R.* 1 Gray, 263; *People v. Chicago etc. R. R. Co.* 53 Ill. 95; and compare *Leavenworth etc. R. R. Co. v. Maris*, 16 Kan. 333; *Pinnex v. Charlotte etc. R. R. Co.* 66 No. Car. 34.

16 *Southern Express Co. v. McVeigh*, 20 Gratt. 264; *Cobb v. Railroad Co.* 33 Iowa, 601.

17 *Cobb v. Railroad Co.* 33 Iowa, 601; and see *Baltimore etc. R. R. Co. v. Green*, 23 Md. 72; *Pittsburg etc. Railw. Co. v. Nash*, 43 Ind. 423; *Cahn v. Mich. etc. R. R. Co.* 71 Ill. 96.

18 *Sherman v. Hudson River R. R. Co.* 5 Daly, 521; *Coffin v. N. Y. etc. R. R. Co.* 64 Barb. 379; and see *Devereux v. Buckley*, 34 Ohio St. 16; 32 Am. R. 342.

§ 259. Carriage of passengers.—Railway companies are not bound to carry passengers safely at all events;¹ but they are bound to the exercise of the utmost human care and foresight, and are responsible for injuries and losses arising from even the slightest negligence.² And the rule that a railway company undertaking to carry passengers is bound to exercise the highest degree of diligence, applies irrespective of any distinction between different kinds of trains.³ It applies, therefore, in favor of a person riding on a freight train, where he is affirmatively shown to have been admitted so to ride, by an authorized agent or officer, and on payment of fare, so as to be a passenger.⁴ In its capacity as a carrier of passengers, the company is bound to exercise the highest degree of care in the construction and maintenance of its roadway, and the appurtenances;⁵ it is bound to furnish safe and comfortable cars,⁶ and safe and ready passage to and from the same;⁷ and its obligation to

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provide for the safety of passengers continues, not only while the passenger is in the cars, but while he is leaving the premises of the company.⁸ And the intoxication of a passenger does not diminish the duty of the company to exercise due care for his safety.⁹ As a general rule, the company is bound to carry all persons who apply for a passage, upon being paid the usual rate of fare.¹⁰ But it may refuse to accept one as a passenger, while so drunk as to be disgusting or annoying to other passengers;¹¹ and it may exclude gamblers from travel on its trains when seeking to use them to ply their vocation thereon;¹² and it is not bound to receive an unusual number of passengers, beyond the number it might reasonably be required to provide for.¹³ So the company can establish and enforce reasonable regulations to secure comfort, order, and safety of passengers;¹⁴ and it is not bound to admit persons as passengers who refuse to obey such regulations, or who are guilty of gross and vulgar habits of conduct.¹⁵ And a passenger in the cars who refuses compliance with the reasonable regulations of the company may be lawfully ejected from the train, although he has paid his fare.¹⁶ Persons traveling upon the company's trains as messengers or agents of an express company are passengers, and entitled to the care due to passengers, although no charge is made for their fare.¹⁷ And so of persons in charge of live stock, merchandise, etc., in transportation on the train.¹⁸ And the company may be liable for causing the death of a person as passenger, though at the time riding on a free pass, upon which was a stipulation, signed by himself, releasing the company from all liability for injury to his person or property while using the same.¹⁹ So one who has procured a ticket, and is present to take the train at the ordinary point of departure, is a passenger, though he has not entered the cars.²⁰ So the relation of carrier and passenger exists between the company and one who, by mistake, gets on a train other than the one upon which he intended to take passage.²¹

But one fraudulently traveling on a train without paying fare has not the rights of a passenger;²² and the company is not liable for a personal injury to such person on its train, or for his death caused by mere negligence.²³ A regulation discriminating in passenger fares, in favor of those who purchase tickets before entering the cars, is not unreasonable;²⁴ but any right of the company to make such discrimination depends on the fact that a reasonable opportunity has been given to obtain tickets at the lower rate.²⁵ To this end, the ticket-office must be kept open a reasonable time prior to the time fixed for the departure of the train.²⁶ The liability of a railway company as a common carrier, for baggage, is founded on the payment of fare by the passenger,²⁷ and the liability continues until the baggage is ready to be delivered to the owner at his destination, and until he has had a reasonable opportunity to receive and remove it.²⁸ The delivery of a check to the passenger relieves him of the care of his baggage during the journey, and devolves such care upon the agents of the several roads over which it passes.²⁹ But the company is not obliged to carry the baggage of one who does not go by the same train;³⁰ and for baggage left at the station beforehand, in anticipation of taking a journey, or left there after the journey has terminated, the company is liable as a warehouseman only.³¹ The term "baggage," within the rule of the carrier's liability, includes such articles only as may become necessary, convenient, or ornamental during the course of the passenger's journey;³² with such reasonable amount of money as will be required to meet his actual and contingent expenses.³³

1 *Wheaton v. North Beach etc. R. R. Co.* 36 Cal. 590; *Brown v. N. Y. Cent. etc. R. R. Co.* 13 N. Y. 409; *Indianapolis etc. R. R. Co. v. Horst*, 93 U. S. 291; *Kansas Pacif. Railw. Co. v. Miller*, 2 Colo. 412; *Drum-wick etc. R. R. Co. v. Gale*, 56 Ga. 322.

2 *Meier v. Penn'a R. R. Co.* 64 Pa. St. 225; 3 Am. R. 581; *Carroll v. Staten Island R. R. Co.* 53 N. Y. 126; *Baltimore etc. R. R. Co. v. Breinig*, 25 Md. 373; *Klein v. Jewett*, 23 N. J. L. 474; *Johnson v. Winona etc. R. R. Co.* 11 Minn. 296; *Hardy v. North Carolina etc. R. R. Co.* 74 No. Car. 734.

4 *Dunn v. Grand Trunk Railw. Co.* 58 Me. 187; *Hazard v. Chicago etc. R. R. Co.* 1 Biss. 503; *Edgerton v. N. Y. etc. R. R. Co.* 30 N. Y. 237; *Indianapolis etc. R. R. Co. v. Horst*, 93 U. S. 201; and see *Lucas v. Milwaukee etc. R. R. Co.* 33 Wis. 41; 14 Am. R. 735; *Arnold v. Ill. Cent. R. R. Co.* 83 Ill. 273; 25 Am. R. 383.

4 *Eaton v. Del. etc. R. R. Co.* 57 N. Y. 382; *Chicago etc. R. R. Co. v. Flagg*, 41 Ill. 364. Compare *Houston etc. R. R. Co. v. Moore*, 49 Tex. 31; 39 Am. R. 38; *Creed v. Penn'a R. R. Co.* 88 Pa. St. 139; 27 Am. R. 593.

5 *Pittsburg etc. R. R. Co. v. Thompson*, 56 Ill. 139; *Reed v. N. Y. etc. R. R. Co.* 5; Barb. 43; *Holyoke v. Grand Trunk Railw. Co.* 44 N. H. 541; *Kansas Pacif. Railw. Co. v. Miller*, 2 Colo. 442; *Great Western Railw. v. Braid*, 1 Moore P. C. (N. S.) 101.

6 *Carroll v. Staten Island R. R. Co.* 58 N. Y. 126; 65 Barb. 32; *McPadden v. N. Y. Cent. R. R. Co.* 44 N. Y. 478; 4 Am. R. 705; and see *Francis v. Cockrell*, Law R. 5 Q. B. 184, 501; *Headhead v. Midland Railw. Co.* Law R. 2 Q. B. 412; Law R. 4 id. 379.

7 *Gonzales v. N. Y. etc. R. R. Co.* 39 How. Pr. 497; *Beard v. Conn. etc. R. R. Co.* 41 Vt. 101; *Chicago etc. Railw. Co. v. Fillmore*, 57 Ill. 265; *Mayo v. Boston etc. R. R.* 104 Mass. 137; *Keating v. N. Y. etc. R. R. Co.* 3 Lam. 461; *Central R. R. Co. v. Perry*, 53 Ga. 461; *McDonald v. Chicago etc. R. R. Co.* 26 Iowa, 124; *Memphis etc. R. R. Co. v. Whitfield*, 44 Miss. 466.

8 *Gaynor v. Old Colony etc. Railw. Co.* 100 Mass. 208. And compare *Armstrong v. N. Y. etc. R. R. Co.* 63 Barb. 437; *Imhoff v. Chicago etc. R. R. Co.* 22 Wis. 631; *Robson v. North Eastern Railw. Co.* Law R. 10 Q. B. 271; 12 Eng. R. 302; *Dublin etc. Railw. Co. v. Slattery*, Law R. 3 App. Cas. 1185; 24 Eng. R. 113.

9 *Milliman v. N. Y. etc. R. R. Co.* 66 N. Y. 643.

10 *Tarbell v. Cent. Pacif. R. R. Co.* 34 Cal. 616; *Beekman v. Schenectady R. R.* 3 Paige, 45; *Westchester etc. R. R. Co. v. Milcs*, 55 Pa. St. 20; *Bennett v. Peninsular etc. Co.* 6 Conn. B. 776; *Tattan v. Great Western Railw.* 2 El. & E. 844.

11 *Pittsburg etc. Railw. Co. v. Vandyne*, 57 Ind. 576.

12 *Thurston v. Union Pacif. R. R. Co.* 22 Int. Rev. Rec. 251.

13 *Hawcroft v. Great Northern Railw. Co.* 8 Eng. L. & Eq. 362; *Evansville etc. R. R. Co. v. Duncan*, 28 Ind. 441.

14 *Bass v. Chicago etc. R. R. Co.* 36 Wis. 450; *Chicago etc. R. R. Co. v. People*, 53 Ill. 355; *Lake Shore etc. R. R. Co. v. Greenwood*, 79 Pa. St. 373; *Pullman Palace Car Co. v. Reed*, 75 Ill. 125.

15 *Jencks v. Coleman*, 2 Sum. 221; *Barney v. Steamboat Co.* 2 Thomp. & C. 598.

16 *Havens v. Hartford etc. R. R. Co.* 28 Conn. 69; and see *Shelton v. Lake Shore etc. R. R. Co.* 29 Ohio St. 214; *Crawford v. Cin. etc. R. R. Co.* 23 Ill. 530; *New Orleans etc. R. R. Co. v. Burke*, 53 Miss. 201; *Hanson v. European etc. R. R. Co.* 62 Me. 84; 16 Am. R. 404; *Kline v. Cent. Pacif. R. R. Co.* 37 Cal. 400.

17 *Blair v. Erie Railw. Co.* 66 N. Y. 313; 23 Am. R. 55; and see *Hammond v. North Eastern R. R. Co.* 6 So. Car. 130; *Commonw. v. Vt. etc. R. R. Co.* 103 Mass. 7; *Ohio etc. R. R. Co. v. Muhlen*, 30 Ill. 9; *Collett v. London etc. Railw. Co.* 16 Q. B. 533. Compare *Union Pacif. Railw. Co. v. Nichols*, 8 Kan. 505; *Flower v. Penn'a R. R. Co.* 69 Pa. St. 210.

18 *Ohio etc. Railw. Co. v. Selby*, 47 Ind. 471; 17 Am. R. 719; *Yeomans v. Contra Costa Steam Nav. Co.* 44 Cal. 71; *Railway Co. v. Stevens*, 95 U. S. 655. See § 257, *ante*.

19 *Rose v. Des Moines Valley Railw. Co.* 39 Iowa, 246; and see *Rail-*

road Co. v. Hopkins, 41 Ala. 486; Jacobus v. St. Paul etc. R. R. Co. 21 Minn. 125. But the rule is otherwise in New York: Poucher v. N. Y. Cent. R. R. Co. 49 N. Y. 263; 10 Am. R. 364; Bissell v. N. Y. Cent. R. R. Co. 25 N. Y. 442; Sunderland v. Westcott, 40 How. Pr. 468; 2 Sweeny, 260; and in England: Gallin v. London etc. Railw. Co. Law R. 10 Q. B. 212; 12 Eng. R. 288; McCawley v. Furness Railw. Co. Law R. 8 Q. B. 57; 4 Eng. R. 218; Alexander v. Toronto etc. Railw. Co. 35 Up. Can. Q. B. 433. Compare Kluney v. Railroad Co. 34 N. J. L. 512.

20 Central R. R. Co. v. Perry, 53 Ga. 461; Gordon v. Grand Street etc. R. R. Co. 40 Barb. 546; Jeffersonville etc. R. R. Co. v. Riley, 39 Ind. 588; Buffett v. Troy etc. R. R. Co. 40 N. Y. 168; and see Allender v. Chicago etc. R. R. Co. 37 Iowa, 264.

21 Columbus etc. R. R. Co. v. Powell, 40 Ind. 37; and see Austin v. Great Western Railw. Co. Law R. 2 Q. B. 442.

22 Austin v. Great Western Railw. Co. Law R. 2 Q. B. 442; and see Great Northern Railw. Co. v. Harrison, 10 Ex. 376.

23 Toledo etc. Railw. Co. v. Brooks, 81 Ill. 245.

24 Jeffersonville R. R. Co. v. Rogers, 28 Ind. 1; Indianapolis etc. Railw. Co. v. Rhoad, 46 Id. 293; and see Pullman Palace Car Co. v. Reed, 73 Ill. 125; Goetz v. Hannibal etc. R. R. Co. 50 Mo. 472; Smith v. Pittsburgh etc. Railw. Co. 23 Ohio St. 10; State v. Gould, 53 Me. 279.

25 St. Louis etc. R. R. Co. v. South, 43 Ill. 176; Jeffersonville R. R. Co. v. Rogers, 28 Ind. 1. But see Bordeaux v. Erie Railw. Co. 8 Hun, 879.

26 St. Louis etc. Railw. Co. v. Myrtle, 51 Ind. 566; Chicago etc. R. R. Co. v. Flagg, 43 Ill. 364.

27 Smith v. Boston etc. R. R. Co. 44 N. H. 330; Wilson v. Grand Trunk Railw. Co. 53 Me. 60; Perkins v. Wright, 37 Ind. 27.

28 Jones v. Norwich etc. Transp. Co. 50 Barb. 193; Dinlany v. N. Y. etc. R. R. Co. 49 N. Y. 546; Louisville etc. R. R. Co. v. Mahan, 8 Bush, 135.

29 Check v. Little Miami R. R. Co. 2 Disn. 237; and see Chicago etc. R. R. Co. v. Clayton, 78 Ill. 616; Rogers v. Long Island R. R. Co. 38 How. Pr. 289; 2 Lans. 269.

30 Graffam v. Boston etc. R. R. Co. 67 Me. 234; Beecher v. Great Eastern Railw. Co. Law R. 5 Q. B. 241; and see Fairfax v. N. Y. etc. R. R. Co. 5 Jones & S. 516; 67 N. Y. 11.

31 Burnell v. N. Y. Cent. R. R. Co. 45 N. Y. 184; 6 Am. R. 61; Mote v. Chicago etc. R. R. Co. 27 Iowa, 22; 1 Am. R. 212; Mattison v. N. Y. Cent. R. R. Co. 57 N. Y. 532; Van Gilder v. Chicago etc. R. R. Co. 44 Iowa, 548; Bartholomew v. St. Louis etc. R. R. Co. 53 Ill. 227; 5 Am. R. 45.

32 Dexter v. Syracuse etc. R. R. Co. 42 N. Y. 326; 1 Am. R. 527; Wilson v. Grand Trunk Railw. Co. 56 Me. 60; 57 Id. 130; 2 Am. R. 26; Hannibal Railroad v. Swift, 12 Wall. 262; Gleason v. Goodrich Transp. Co. 32 Wis. 65; Stinson v. Conn. etc. R. R. Co. 18 Mass. 83; Fraloff v. N. Y. etc. R. R. Co. 10 Blatchf. 16; Macrow v. Great Western Railw. Co. Law R. 6 Q. B. 612. Hudson v. Midland Railw. Co. Law R. 10 Q. B. 366.

33 First Nat. Bank v. Marietta etc. R. R. Co. 20 Ohio St. 259; 5 Am. R. 635; Wilson v. Grand Trunk Railw. Co. 56 Me. 60; Weeks v. N. Y. etc. R. R. Co. 9 Hun, 639; aff'd, 73 N. Y. 50. See, as to condition limiting liability in respect of passengers' baggage: Rawson v. Penn'a R. R. Co. 48 N. Y. 212; Cohen v. Southeastern Railw. Co. Law R. 1 Ex. D. 217.

§ 260. Freights, fares, and other charges.—The right of a railway company to take tolls, freight, and

fares can never be raised by implication.¹ It can only be exercised under an express grant in the charter,² and is subject to general regulation by the legislature, unless that body has by express compact with the company surrendered or restricted its authority.³ And in determining questions as to the right to take freight, etc., courts will construe the charter most in favor of the public and most against the company.⁴ Discriminations in rates of toll, which are fair and reasonable, and founded on reasons consistent with the public interest, may be allowable.⁵ But under like circumstances, a like rate should be imposed upon all persons for the transportation of goods of like description;⁶ and a contract by a railway company to carry goods for one person at a cheaper rate than for another, under the same conditions, is held to be void, as creating an illegal preference.⁷ But the company may discriminate between the amount of fare where a ticket is purchased at a ticket-office and where the fare is paid upon the train.⁸ Under a statute imposing a penalty on railway companies for extorting excessive fares, one who has paid the excessive fare when riding in expectation of being overcharged, and simply for the purpose of obtaining the penalty, is entitled to recover;⁹ and under the Iowa statute, the penalty for overcharging and the amount wrongfully collected may be recovered in a single action.¹⁰ A railway company has a lien upon the goods transported over its route for the freight earned;¹¹ but the lien is only coextensive with the right to claim and recover freight,¹² and the company cannot hold goods by virtue of a lien for back freights;¹³ and no right of lien for freight can grow out of a wrongful bailment of the goods to the company.¹⁴ Where, by reason of the default of the consignee in not receiving goods, the carrier acquires a right to store them, he may do so without losing his lien for the freight, whether deposited in his own name or that of the owner, subject to the lien.¹⁵ And where a consignee fails to remove goods in accordance

with a regulation of the company, known to him, that goods must be unloaded within twenty-four hours after notice of their arrival, the company has a lien on the goods for storage after such time has expired.¹⁶ An unqualified delivery of the property extinguishes the carrier's lien;¹⁷ but a railway company may release its lien upon part of the goods carried, and retain the balance for the charges upon the whole.¹⁸

- 1 Camden etc. R. R. Co. v. Briggs, 22 N. J. L. 623.
- 2 Camden etc. R. R. Co. v. Briggs, 22 N. J. L. 623; and see Pittsburg etc. Railw. Co. v. Moore, 33 Ohio St. 384.
- 3 Peik v. Chicago etc. R. R. Co. 94 U. S. 164, 176; State v. Winona etc. R. R. Co. 19 Minn. 134; Blake v. Winona etc. R. R. Co. 19 id. 418. Compare Phila. etc. R. R. Co. v. Bowers, 4 Houst. 506.
- 4 Barrett v. Stockton etc. Railw. Co. 2 Man. & G. 134; 7 id. 870; Camden etc. R. R. Co. v. Briggs, 22 N. J. L. 623.
- 5 Hersh v. Northern etc. R. R. Co. 74 Pa. St. 181; Chicago etc. R. R. Co. v. People, 67 Ill. 11; Fitchburg R. R. Co. v. Gage, 12 Gray, 393; and see Harris v. Cokesmouth Railw. Co. 3 Com. B. N. S. 693.
- 6 Chambliss v. Phila. etc. R. R. Co. 4 Brewst. 563; Crouch v. Great Northern Railw. Co. 9 Ex. 566.
- 7 Messenger v. Penn'a R. R. Co. 36 N. J. L. 407; 13 Am. R. 457; aff'd 37 N. J. L. 631; 18 Am. R. 754.
- 8 Crocker v. New London etc. Railw. 24 Conn. 249; and see § 259, *ante*.
- 9 Fisher v. N. Y. etc. R. R. Co. 46 N. Y. 644.
- 10 Fuller v. Chicago etc. R. R. Co. 31 Iowa, 187.
- 11 Briggs v. Boston etc. R. R. Co. 6 Allen, 246; Langworthy v. N. Y. etc. R. R. Co. 2 Smith, E. D. 195; Stevens v. Boston etc. R. R. Co. 8 Gray, 262, 266.
- 12 Dyer v. Grand Trunk Railw. Co. 42 Vt. 441; 1 Am. R. 350.
- 13 Leonard v. Winslow, 2 Grant Cas. 139; Wallis v. London etc. Railw. Co. Law R. 5 Ex. 62.
- 14 Robinson v. Baker, 5 Cush. 137; Stevens v. Boston etc. R. R. Co. 8 Gray, 262; and see Clark v. Lowell etc. R. R. Co. 9 id. 231; Gilson v. Gwinn, 107 Mass. 126; 9 Am. R. 13.
- 15 Western Transp. Co. v. Barber, 56 N. Y. 544.
- 16 Miller v. Mansfield, 112 Mass. 260. Compare Cromwell v. N. Y. etc. R. R. Co. 1 Abb. N. Y. App. 472; 4 Keyes, 90; 10 Bosw. 77.
- 17 See Bigelow v. Heaton, 4 Denio, 496; Lane v. Old Colony etc. R. R. Co. 14 Gray, 143.
- 18 Chicago etc. R. R. Co. v. Northwestern Union Packet Co. 38 Iowa, 377.

§ 261. Negligence in management of trains, etc.

—No relation arising out of contract, express or implied, exists between a railway company and the general pub-

lic, and as towards the latter the former is only bound for ordinary care and prudence.¹ At depots and station-houses, and grounds connected with them, the company is bound to manage its locomotives and trains with a care proportioned to the consideration that they are placed where the public may and do constantly resort;² and it is liable, even to persons unlawfully upon its premises, for injuries arising from its negligence or from its tortious acts.³ So, if its turn-tables are situated in public places where children are accustomed to play, which fact is known to the company, it is liable for an injury to a child occasioned from leaving a turn-table unfastened.⁴ But it is not bound to maintain a guard over its cars left standing upon the track, to prevent children playing about them from incurring injury.⁵ And if persons who are not passengers crowd upon the platform of the company in such numbers that it breaks down, and they are injured, the company is not liable.⁶ Nor is it liable for an injury to a person resulting from its failure to exercise ordinary skill and care in the erection or maintenance of its station-house, where, at the time of the injury, such person was at the station by mere permission and sufferance, and not on business.⁷ It is the duty of a railway company to use upon its trains all improvements in machinery, or in the construction of cars, etc., that are commonly used by other companies;⁸ and it is liable for injuries resulting from a failure in this respect.⁹ So, if a railway company permits its engineers to allow their firemen to handle the locomotives, and damage is thereby caused by the incompetency of a fireman, the company is liable.¹⁰ And it is guilty of gross negligence in running a train of six or eight cars without a brakeman, or in charge of an incompetent brakeman.¹¹ The publication of a time-table, in the ordinary form, makes it obligatory upon the company to use due care and skill to have its trains arrive and depart at the precise moments indicated.¹² And it is gross negligence for the company so to

arrange its time-table that within one minute from the time a train passes from a station another train, running at the rate of thirty miles or more an hour, should pass the same point.¹³ A railway company is bound to exercise ordinary care to avoid running over a person upon the track, although he is a trespasser thereon;¹⁴ and the same rule applies where animals are upon the track wrongfully, as trespassers, or by the negligence of the owner.¹⁵ And the company may be held liable for injuries to stock caused by a train moving at a greater rate of speed than that allowed by law, regardless of the conduct of the animals.¹⁶ But it will not be held liable for the neglect of its agent to check the rate of speed, or sound the whistle, if these efforts could not have prevented the injuries.¹⁷ In operating its road through the public streets of a city or village, a railway company is held to the exercise of a very high degree of care;¹⁸ and running a train in the night through a village without a headlight, or other warning of its approach, renders the company responsible for any damage caused thereby.¹⁹ And generally, if danger to person or property may be reasonably apprehended from the running of trains without giving notice of their approach, the company is bound to give such notice, and the omission is negligence.²⁰ And it is bound to give notice, in any specific manner required by statute, of the approach of a train at a crossing; as, by ringing a bell, blowing a whistle, giving signal by a flagman, etc.²¹ It is likewise the duty of a railway company to take all reasonable precautions to prevent the spread of fire from its locomotives;²² and for any negligence in the use of it for generating steam, the company will be liable.²³ And it has been held that the escape of fire from a locomotive raises a presumption of negligence on the part of the company.²⁴

1 Pendleton Street R. R. Co. v. Shires, 18 Ohio St. 255.

2 Illinois etc. R. R. Co. v. Hammer, 73 Ill. 347.

3 Railroad Co. v. Stout, 17 Wall. 657. Compare Penn'a R. R. Co. v. Lewis, 79 Pa. St. 33; Illinois etc. R. R. Co. v. Hall, 73 Ill. 222; Illinois etc. R. R. Co. v. Godfrey, 71 Id. 500.

8 *Stout v. Sioux City etc. R. R. Co.* 2 Dill. 294. But see *Kansas Cent. Railw. Co. v. Fitzsimmons*, 22 Kans. 686; 31 Am. R. 263; *St. Louis etc. R. R. Co. v. Bell*, 81 Ill. 76; 25 Am. R. 269; *Koons v. St. Louis etc. R. R. Co.* 3 Mo. 562.

9 *Chicago etc. R. R. Co. v. McLaughlin*, 47 Ill. 265; *Central etc. R. R. Co. v. Henigh*, 23 I. ans. 347; 33 Am. R. 167.

10 *Gillis v. Pen 'a R. R. Co.* 59 Pa. St. 129.

11 *Pittsburg etc. R. R. Co. v. Bingham*, 29 Ohio St. 364. Compare *Toledo etc. R. R. Co. v. Grush*, 67 Ill. 283; 16 Am. R. 618; *Tobin v. Portland etc. R. R. Co.* 59 Me. 183; 8 Am. R. 415.

12 *Costello v. Syracuse etc. R. R. Co.* 65 Barb. 92; and see *Illinois etc. R. R. Co. v. Phillips*, 49 Ill. 234.

13 *Forbes v. Atlantic etc. R. R. Co.* 76 No. Car. 454.

14 *Harper v. Indianapolis etc. R. R. Co.* 47 Mo. 567; 4 Am. R. 353.

15 *Toledo etc. R. R. Co. v. McGinnis*, 71 Ill. 346.

16 *Gordon v. Manchester etc. R. R. Co.* 52 N. H. 596.

17 *Gonzales v. N. Y. etc. R. R. Co.* 39 How. Pr. 407.

18 *Kay v. Pe. n'a R. R. Co.* 65 Pa. St. 269; *Chicago etc. R. R. Co. v. Payne*, 49 Ill. 49; *Isabel v. Hannibal etc. R. R. Co.* 60 Mo. 475. Compare *Penn'a R. R. Co. v. Lewis*, 79 Pa. St. 33; *Pittsburg etc. Railw. Co. v. Collins*, 87 Id. 495; 30 Am. R. 371; *Morrissey v. Eastern R. R. Co.* 123 Mass. 377; 30 A. 1. R. 686.

19 *Railford v. Miss. etc. v. R. Co.* 43 Miss. 233; *Cin. etc. R. R. Co. v. Smith*, 22 Ohio St. 227; *Baltimore etc. R. R. Co. v. Mulligan*, 45 Md. 484; *Toledo etc. R. R. Co. v. Bray*, 57 Ill. 514; and see *Trout v. Virginia etc. R. R. Co.* 23 Gratt. 619; *Rockford etc. R. R. Co. v. Rafferty*, 73 Ill. 58; *Railroad Co. v. Jones*, 56 Ala. 507. In Massachusetts, it must be shown that the injury resulted from the wanton and reckless misconduct of the employees; *McDonnell v. Pittsfield etc. R. R. Co.* 115 Mass. 564; *Maynard v. Boston etc. R. R. Co.* Id. 458; *Darling v. Boston etc. R. R. Co.* 121 Id. 118. Compare *Page v. No. Car. etc. R. R. Co.* 71 No. Car. 222; *Ohio etc. R. R. Co. v. Clutter*, 82 Ill. 123; *Benlis v. Conn. etc. R. R. Co.* 42 Vt. 375; *Fritz v. First Div. etc. R. R. Co.* 22 Minn. 404; *Richmond v. Sacramento etc. R. R. Co.* 18 Cal. 351; *Sneesby v. Lancashire etc. Railw. Co.* Law R. 9 Q. B. 263.

20 *Houston v. c. R. R. Co. v. Terry*, 42 Tex. 451. But see *Monahan v. Keokuk etc. R. R. Co.* 45 Iowa, 523.

21 *Flattes v. Chicago etc. R. R. Co.* 35 Iowa, 191; and compare *Watson v. Railroad Co.* 7 Phila. 243; *Stoneman v. Atlantic etc. R. R. Co.* 58 Mo. 503.

22 *Hicks v. Pacific R. R. Co.* 64 Mo. 430; *Wilson v. Cunningham*, 3 Cal. 341; *Barley v. Chicago etc. R. R. Co.* 4 Biss. 430; *New Jersey etc. R. R. Co. v. We t.* 3 Vroom. 91; *Phila. etc. R. R. Co. v. Stinger*, 78 Pa. St. 219.

23 *Indianapolis etc. R. R. Co. v. Galbreath*, 63 Ill. 436.

24 *Penn'a R. R. Co. v. Barnett*, 59 Pa. St. 269; and see *Artz v. Chicago etc. R. R. Co.* 34 Iowa, 152; *Louisville etc. R. R. Co. v. Commonwealth* 13 Bush, 388; 26 Am. R. 265.

25 *Grippen v. N. Y. etc. R. R. Co.* 40 N. Y. 34; *Beistegel v. N. Y. etc. R. R. Co.* Id. 9. Compare *Guliano v. N. Y. etc. R. R. Co.* 60 N. Y. 133; *French v. Taunton Branch R. R. Co.* 116 Mass. 537; *Leavenworth etc. R. R. Co. v. Rice*, 10 Kan. 425; *Brown v. Milwaukee etc. R. R. Co.* 22 Minn. 165; *Robinson v. Railroad Co.* 45 Cal. 403; *Cordell v. Railroad Co.* 70 N. Y. 119, 123; *Bilbee v. Brighton Railw. Co.* 18 Conn. B. N. S. 592.

26 *Troxler v. Richmond etc. R. R. Co.* 74 No. Car. 377; *Penn'a R. R. Co. v. Hope*, 80 Pa. St. 373; 21 Am. R. 160; *Toledo etc. R. R. Co. v. Corn*,

71 Ill. 493; *Cleveland v. Grand Trunk Railw. Co.* 42 Vt. 499; *Bedell v. Long Island R. R. Co.* 44 N. Y. 376.

23 *Burlington etc. R. R. Co. v. Westover*, 4 Neb. 268; *Louisville etc. R. R. Co. v. Richardson*, 66 Ind. 43; 32 Am. R. 94.

24 *Spaulding v. Chicago etc. Railw. Co.* 30 Wis. 110; 11 Am. R. 550; *Coale v. Hannibal etc. R. R. Co.* 60 Mo. 227; *Burke v. Louisville etc. R. R. Co.* 7 Helsk. 451; 19 Am. R. 618; *Atchison etc. R. R. Co. v. Campbell*, 16 Kan. 240. But see *Gandy v. Chicago etc. R. R. Co.* 30 Iowa, 420; *Phila. etc. R. R. Co. v. Yerger*, 73 Pa. St. 121; *Indianapolis etc. R. R. Co. v. Paramore*, 31 Ind. 143. An English railway company, having no express authority to use steam or other power involving the use of fire, is absolutely liable for an injury by fire from its locomotives: *Jones v. Festiniog Railw. Co.* Law R. 3 Q. B. 733; *Powell v. Fall*, 43 L. T. Rep. N. S. 562; 23 Alb. L. J. 153. And so by statute in some of the states in the case of chartered railroads: see *Hooksett v. Concord etc. R. R. Co.* 33 N. H. 242; *Ingersoll v. Stockbridge etc. R. R. Co.* 8 Allen, 438; *Stearns v. Atlantic etc. R. R. Co.* 46 Me. 95.

§ 262. **Contributory negligence.**—In an action against a railway company to recover for an injury caused by its negligence, the defendant may show, in defense, that the negligence of the plaintiff concurred in producing the injury, and thus defeat a recovery.¹ The burden of proof in such case rests upon the defendant;² but if the negligence of the plaintiff appears from his own testimony, it will defeat the action.³ And the rule adopted in some of the states is, that the plaintiff must prove that he was free from contributory fault, or fail in his action.⁴ But in order to prevent a recovery, the plaintiff's negligence must proximately contribute to the injury;⁵ and where the negligence of the defendant is proximate, and that of the plaintiff remote, the action will be sustained, though the plaintiff is not entirely free from fault.⁶ Under the rule adopted in Illinois, although the plaintiff may have been guilty of some negligence, still, if it is slight, as compared with that of the defendant, he may recover.⁷ Contributory negligence which will excuse the defendant from liability must be the personal act of the party injured, or of some one whose fault is imputable to him;⁸ and the negligence of a mere stranger, contributive to the injury, affords no excuse for the negligence of the defendant, nor a reason why the latter should not respond in damages.⁹ The rule as to contributory negligence, in

the case of a child injured by the careless management of a railway train, is, that if the child would have escaped injury by the exercise of such diligence as might reasonably be expected from a person of its age and intelligence, the company is not liable.¹⁰ The caution required is according to the maturity and capacity of the child, and this is to be determined by the circumstances of each particular case.¹¹ If the owner of cattle or other live stock permits them to range in proximity to passing trains, and to wander on the uninclosed track of a railroad, he takes the risk of their loss or injury by unavoidable accident.¹² And if he permits them to go at large in a city, where a railroad is not required to be fenced, it is such negligence on his part as will prevent a recovery by him for cattle killed by the trains of the company at such place,¹³ unless the injury was willful.¹⁴ But the owner of stock killed by a railway company is not chargeable with contributory negligence in letting it run at large, if it breaks out of the pasture without his fault.¹⁵

1 Central etc. R. R. Co. v. Dixon, 42 Ga. 327; Robinson v. Western Pacif. R. R. Co. 48 Cal. 403; Railroad Co. v. Houston, 95 U. S. 697; Baker v. Atlantic etc. R. R. Co. 64 Mo. 267; Toledo etc. R. R. Co. v. Shuckman, 50 Ind. 42; Paducah etc. R. R. Co. v. Hoehl, 12 Bush, 41; Rockford etc. R. R. Co. v. Byam, 80 Ill. 523; Weiss v. Penn'a R. R. Co. 75 Pa. St. 337; McCall v. N. Y. etc. R. R. Co. 54 N. Y. 642.

2 Hoyt v. Hudson, 41 Wis. 105; 22 Am. R. 714; Thompson v. North Mo. R. R. Co. 51 Mo. 190; 11 Am. R. 443; Railroad Co. v. Gladman, 15 Wall. 401; and see Stackus v. N. Y. etc. R. R. Co. 73 N. Y. 464.

3 Brown v. Milwaukee etc. R. R. Co. 22 Minn. 165.

4 See Pendleton etc. R. R. Co. v. Stallman, 22 Ohio St. 1; Warner v. N. Y. Cent. R. R. Co. 44 N. Y. 465; Dickey v. Maine Tel. Co. 43 Me. 492; Murphy v. Deane, 104 Mass. 453; 3 Am. R. 300; Mich. Cent. R. R. Co. v. Coleman, 23 Mich. 440.

5 Flynn v. San Francisco etc. R. R. Co. 40 Cal. 14; 6 Am. R. 595; Munius v. Champlon, 40 Cal. 121; and see Button v. Hudson River R. R. Co. 18 N. Y. 248; Beers v. Housatonic R. R. Co. 19 Conn. 566; Isbell v. N. Y. etc. R. R. Co. 27 Id. 333; Kerwhacker v. Railroad Co. 3 Ohio St. 172; Davies v. Mann, 10 Mees. & W. 546; Fernandes v. Sacramento City Railw. Co. 52 Cal. 45.

6 Manly v. Wilmington etc. R. R. Co. 74 No. Car. 635; Miss. etc. R. R. Co. v. Mason, 51 Miss. 234; Walsh v. Miss. Valley Transp. Co. 52 Mo. 434; Cleveland etc. R. R. Co. v. Elliott, 28 Ohio St. 340; Needham v. San Francisco etc. R. R. Co. 37 Cal. 409; Baltimore etc. R. R. Co. v. Mulligan, 45 Md. 486. Compare Cook v. N. Y. etc. R. R. Co. 1 Abb. N. Y. App. 432.

7 Chicago etc. R. R. Co. v. Pondrom, 51 Ill. 333; 2 Am. R. 306; Rock-

ford etc. R. R. Co. v. Delaney, 82 Ill. 198; 25 Am. R. 308; Chicago etc. Railw. Co. v. Clark, 70 Ill. 276; Chicago etc. R. R. Co. v. Hatch, 79 Id. 137; and see Railroad Co. v. Carroll, 6 Helsk. 347; Pacific R. R. Co. v. Houts, 12 Kan. 323; Lafayette etc. R. R. Co. v. Adams, 26 Ind. 76.

8 See Webster v. Hudson River R. R. Co. 38 N. Y. 260; Sauter v. N. Y. etc. R. R. Co. 66 N. Y. 50; 23 Am. R. 18; Schmidt v. Milwaukee etc. R. R. Co. 23 Wis. 188; Wright v. Malden etc. R. R. Co. 4 Allen, 283; Balt. etc. R. R. Co. v. State, 30 Md. 47; Keefe v. Milwaukee etc. R. R. Co. 21 Minn. 207; 18 Am. R. 393; McGarry v. Loomis, 63 N. Y. 104; 20 Am. R. 510; Waite v. Northeastern Railw. Co. El. B. & E. 719; Burrows v. March Gas Co. Law R. 5 Ex. 67.

9 Webster v. Hudson River R. R. Co. 38 N. Y. 260.

10 Reynolds v. N. Y. Cent. etc. R. R. Co. 2 Thomp. & C. 644; Kenyon v. N. Y. Cent. R. R. Co. 5 Hun, 479; Costello v. Syracuse etc. R. R. Co. 65 Barb. 92; Rockford etc. R. R. Co. v. Delaney, 82 Ill. 198; Balt. etc. R. R. Co. v. Breinig, 25 Md. 378; Nagle v. Allegheny Valley R. R. Co. 88 Pa. St. 35; 32 Am. R. 413.

11 Railroad Co. v. Gladman, 15 Wall, 401; and see North Penn'a R. R. Co. v. Mahoney, 57 Pa. St. 187; Chicago etc. R. R. Co. v. Beaker, 76 Ill. 25; Reynolds v. N. Y. Cent. R. R. Co. 38 N. Y. 248; Casey v. N. Y. etc. R. R. Co. 8 Daly, 220.

12 Ralford v. Miss. R. R. Co. 43 Miss. 233; Locke v. St. Paul etc. R. R. Co. 15 Minn. 380; Eames v. Salem etc. R. R. Co. 98 Mass. 560. Compare Rockford etc. R. R. Co. v. Irish, 72 Ill. 404; Georgia etc. R. R. Co. v. Neely, 56 Ga. 540; McPheeters v. Hannibal etc. R. R. Co. 45 Mo. 22; Jeffersonville etc. R. R. Co. v. Adams, 43 Ind. 402.

13 Peoria etc. R. R. Co. v. Barton, 80 Ill. 72; Brady v. Rensselaer etc. R. R. Co. 1 Hun, 378; 3 Thomp. & C. 537; Jeffersonville etc. R. R. Co. v. Huber, 42 Ind. 173.

14 Jeffersonville etc. R. R. Co. v. Underhill, 48 Ind. 389; and see § 253, *ante*.

15 See Pacific R. R. Co. v. Brown, 14 Kan. 469; Toledo etc. R. R. Co. v. Johnston, 74 Ill. 83; Sheaf v. Utica etc. R. R. Co. 2 Thomp. & C. 388.

§ 263. Associated companies.—A railway company with ordinary powers is presumably liable only for its own line for passengers or freight received to be transported over that and connecting lines.¹ But it is competent for the company, as a common carrier, to contract to carry either passengers or freight beyond the terminus of its own line;² and where such a contract is entered into, the company subjects itself to liability for loss or injury over the whole course of transit.³ And it has been held in some of the states, in accordance with the English rule,⁴ that the acceptance by a railway company of goods marked to a point beyond its own line imposes a duty to deliver them to the consignee.⁵ But the rule generally followed in the United States is, that the company is liable for injuries that occur beyond the termination of its

own road only when it enters into a contract to deliver the property at a point beyond.⁶ But when it does so contract, any stipulation in the contract or notice to the other party, to the effect that the company will not be liable for loss or damage occasioned by negligence or fault while the goods are not upon its own road, is against public policy and void, equally as in case of transportation exclusively upon its own road.⁷ The company delivering property in an injured condition is presumed to be responsible for the injury, rather than some prior company from which it received the property.⁸

1 Railroad Co. v. Pratt, 22 Wall. 123; Sherman v. Hudson River R. R. Co. 64 N. Y. 254; Walt v. Albany etc. R. R. Co. 5 Lans. 475; Knight v. Portland etc. R. R. Co. 56 Me. 234; Hartan v. Eastern R. R. Co. 114 Mass. 44.

2 Kessler v. N. Y. etc. R. R. Co. 7 Lans. 63; 61 N. Y. 533; Mills v. Orange etc. R. R. Co. 1 McAr. 285; Croft v. Baltimore etc. R. R. Co. id. 492; Noyes v. Rutland etc. R. R. Co. 27 Vt. 110; Rome R. R. Co. v. Sullivan, 25 Ga. 228.

3 Kessler v. N. Y. etc. R. R. Co. 7 Lans. 63; 61 N. Y. 533; Monell v. Northern etc. R. R. Co. 67 Barb. 631; Croft v. Baltimore etc. R. R. Co. 1 McAr. 492; Wyld v. Northern R. R. Co. 14 Abb. Pr. N. S. 213.

4 See Morse v. Brainerd, 41 Vt. 550; Muschamp v. Railw. Co. 8 Mees. & W. 421; Cranch v. Railw. Co. 25 Eng. L. & Eq. 257.

5 See Louisville etc. R. R. Co. v. Campbell, 7 Heisk. 253; Mulligan v. Ill. etc. R. R. Co. 36 Iowa, 181; Nashua Lock Co. v. Worcester etc. R. R. Co. 48 N. H. 339; 2 Am. R. 262; Milwaukee etc. R. R. Co. v. Smith, 74 Ill. 197.

6 Crawford v. Southern R. R. 51 Miss. 222; Lowenburg v. Jones, 56 id. 688; 31 Am. R. 379; Morse v. Brainerd, 41 Vt. 550; and see Cutts v. Brainerd, 42 id. 666; Toledo etc. R. R. Co. v. Lockhart, 71 Ill. 627.

7 Cin. etc. R. R. Co. v. Pontius, 19 Ohio St. 221; 2 Am. R. 391.

8 Evans v. Atlanta etc. R. R. Co. 56 Ga. 498; Paramore v. Western R. R. Co. 53 id. 383; and see Sherman v. Hudson River R. R. Co. 64 N. Y. 254.

§ 264. Railroads in streets.—The legislature may authorize a railway company to build its road within the corporate limits of a town or city, or upon a street or other public highway.¹ It may even authorize the use of a street for a railroad without the consent of the city, and without making compensation to the city.² The power which the state has to set apart a proper portion of a city street for railroad use may be, and usually is, delegated to the municipal government;³ and a railway company may ac-

quire, by conveyance from the city authorities, the same right to occupy the streets for the use of its road as it might acquire under the right of eminent domain.⁴ The grant of a right to build a railroad in a city street is not necessarily exclusive;⁵ and under such a grant, not exclusive, the legislature may lawfully authorize a second company to use the tracks of the first railway, making compensation therefor.⁶ And city councils, having a general power to authorize railroads to be laid in the streets, may, although there is one track in a street, grant the right to construct another in the same street.⁷ And a street railway company cannot complain that another railway track is allowed to cross theirs.⁸ Nor is the exclusive right to construct and operate a horse railway in a city infringed by the construction of a road in the same city to be operated by steam.⁹ It has generally been held, that the construction and operation of a horse railroad in the public streets of a city does not impose a new servitude upon the land, for which the owners of the fee are entitled to compensation;¹⁰ except, perhaps, where some private right of such an owner, as his free access to his own land or buildings, has been materially impaired thereby.¹¹ But the courts in some of the states hold, that the owner of the fee is entitled to compensation for the additional burden imposed by the street railway.¹² If the charter requires the consent of a majority of the property owners along the proposed route, their acquiescence in standing by without protest, and seeing the company construct and operate its road under a claim of right, may be regarded as evidence of consent.¹³

1 *Tenn. etc. R. R. Co. v. Adams*, 3 Head, 596; and see *Baltimore etc. R. R. Co. v. Reaney*, 42 Md. 117; *Adams v. Saratoga etc. R. R. Co.* 11 Barb. 414; *People v. N. Y. etc. R. R. Co.* 45 Id. 73; *Porter v. North Mo. R. R. Co.* 33 Mo. 128; *Ex parte So. Car. R. R. Co.* 2 Rich. 434; *State v. Mayor etc.* 35 N. J. L. 205.

2 *Hine v. Keokuk etc. R. R. Co.* 42 Iowa, 636; and see *Hinchman v. Peterson Horse Railw. Co.* 17 N. J. Eq. 75; *People v. Kerr*, 37 Barb. 387; *New Orleans etc. R. R. Co. v. New Orleans*, 26 La. An. 517; *Cin. etc. R. R. Co. v. Cummingville*, 14 Ohio St. 523; *South Carolina R. R. Co. v. Steiner*, 44 Ga. 546.

3 *N. Y. etc. R. R. Co. v. New York*, 1 Hilt. 563; *Jersey City etc. Railw. Co. v. Jersey City etc. Railw. Co.* 20 N. J. Eq. 61.

4 *Cook v. City of Burlington*, 36 Iowa, 357; and compare *Ingram v. Railroad Co.* 33 Id. 609. But city authorities cannot confer upon individuals, by contract or license for an indefinite period, the franchise of constructing and operating a railroad in the public streets for their own private use: *Milbau v. Sharp*, 27 N. Y. 611; *State v. Inhabitants etc.* 36 N. J. L. 79.

5 *Brooklyn etc. R. R. Co. v. Coney Island R. R. Co.* 35 Barb. 364.

6 *Metropolitan R. R. v. Highland St. Railw. Co.* 118 Mass. 290; and see *Metropolitan R. R. Co. v. Quincy R. R. Co.* 12 Allen, 262; *Brooklyn Cent. R. R. Co. v. Brooklyn City R. R. Co.* 32 Barb. 358.

7 *Oakland R. R. Co. v. Oakland etc. R. R. Co.* 45 Cal. 365. 13 Am. R. 181.

8 *Market St. Railw. Co. v. Cent. Railw. Co.* 51 Cal. 583; *Brooklyn etc. R. R. Co. v. Brooklyn R. R. Co.* 33 Barb. 420. See *Perry v. New Orleans etc. R. R. Co.* 55 Ala. 413; 23 Am. R. 740. But such company is entitled to exclude from the habitual and continuous use of its track, any one engaged in carrying passengers for hire in competition with it: *Citizens' Coach Co. v. Camden Horse R. R. Co.* 23 Alb. L. J. 169.

9 *Denver etc. Railw. Co. v. Denver City Railw. Co.* 2 Cal. 673.

10 *New Albany Railw. Co. v. O'Dally*, 12 Ind. 551; *Att.-Gen. v. Metrop. Railw. Co.* 125 Mass. 515; 28 Am. R. 284; *Elliott v. Fair Haven etc. R. R. Co.* 32 Conn. 579; *Hinchman v. Paterson Horse Railw. Co.* 17 N. J. Eq. 75; *Paterson etc. Horse R. R. Co. v. Paterson*, 9 Green, C. E. 158. Compare *Ford v. Chicago etc. R. R. Co.* 14 Wis. 609.

11 *Hobart v. Milwaukee City R. R. Co.* 27 Wis. 194; 9 Am. R. 461. See also *Chn. etc. Railw. Co. v. Cummingsville*, 14 Ohio St. 523; *Crawford v. Delaware*, 7 Id. 469.

12 *Craig v. Rochester City etc. R. R. Co.* 39 N. Y. 404; and compare § 248, *ante*.

13 *Paterson etc. R. R. Co. v. Mayor etc.* 24 N. J. Eq. 158.

§ 265. **Extent of right to use of street.**—The interest of a horse railway company in the street through which its tracks run is a right of way.¹ The franchise authorizes the company to use the street only in common with others.² The business of the company in carrying passengers in cars over the streets must be conducted under the restrictions which govern natural persons transacting the same business.³ The municipal authorities have the power to regulate the manner in which the franchise of the company is to be exercised;⁴ and this includes authority to impose upon the company a reasonable license fee, for the purpose of maintaining proper police regulations.⁵ If a railway company accepts a license from a city to construct its road in the streets of the latter, the terms and conditions of the license consti-

tute a contract which is binding upon the parties.⁶ But when a company has the right to occupy the streets with its track, without the consent of the municipal authorities, the city cannot impose conditions upon the company, by an ordinance granting the right of way, which will be binding.⁷ In running its cars, a street railway company is not subject to the ordinary law of the road;⁸ and other vehicles must turn out of the way for its cars.⁹ But an individual has the right to walk on the track of a street railway,¹⁰ and is not required to abandon the track to avoid possible injuries which may result from the carelessness of the company.¹¹ So, if a street car is stopped so as to obstruct the passage of a traveler on foot, he may rightfully step upon and pass over the platform of the car, in order to avoid the obstruction.¹² The company is bound to lay its tracks in a proper manner, and to keep them in repair;¹³ and the obligation to repair extends to those parts of its road proximately connected with its track, as well as to the track itself.¹⁴ A charter provision requiring the company to keep the street "in perpetual good repair" imposes the duty of removing from the street a deposit of rocks and debris caused by an extraordinary rain.¹⁵ For any careless management of trains along a city street, causing sudden and unusual noises, whereby horses are needlessly frightened and caused to run, from which injury results, the company may be held liable.¹⁶

1 New York etc. R. R. Co. v. Forty-second St. R. R. Co. 32 How. Pr. 481; 50 Barb. 243.

2 Middlesex R. R. Co. v. Wakefield, 103 Mass. 261; and see Kellin-
ger v. Forty-second St. R. R. Co. 50 N. Y. 206.

3 Frankfort etc. Railw. Co. v. Philadelphia, 58 Pa. St. 119; and
compare Unger v. Forty-second St. R. R. Co. 51 N. Y. 497. But see
Barues v. Dist. of Columbia, 1 McAr. 322.

4 Middlesex R. R. Co. v. Wakefield, 103 Mass. 261. A municipal
corporation, authorized to construct sewers, may remove a horse
railway from the street, if necessary for that purpose: Kirby v. Citi-
zens' Railw. Co. 48 Md. 168; 30 Am. R. 455.

5 Johnson v. Philadelphia, 60 Pa. St. 445.

6 Mayor etc. v. Troy etc. R. R. Co. 49 N. Y. 657; and compare Cov-
ington etc. R. R. Co. v. Covington, 9 Bush, 127; Pacific R. R. Co. v.
Leavenworth, 1 Dill. 352.

- 7 Council Bluffs v. Kansas City etc. R. R. Co. 45 Iowa, 333.
- 8 Barker v. Hudson River R. R. Co. 4 Daly, 274.
- 9 Commonw. v. Temple, 14 Gray, 69; Iatho v. Railw. Co. 4 Phila. 24; Jersey City etc. R. R. Co. v. Jersey City etc. R. R. Co. 20 N. J. Eq. 61; Adolph v. Central Park etc. R. R. Co. 65 N. Y. 554; Whitaker v. Eighth Av. R. R. Co. 51 N. Y. 295. Compare Camden Horse R. R. Co. v. Citizens' Coach Co. 23 N. J. Eq. 145.
- 10 Kansas etc. Railw. Co. v. Pointer, 9 Kans. 629.
- 11 Shea v. Potrero etc. R. R. Co. 44 Cal. 414. And see Schierhold v. North Beach etc. R. R. Co. 40 Id. 447; Citizens' Street Railw. Co. v. Carey, 56 Ind. 396.
- 12 Shea v. Sixth Av. R. R. Co. 5 Daly, 221; 62 N. Y. 180; 20 Am. R. 460.
- 13 Carpenter v. Cent. Park etc. R. R. Co. 11 Abb. Pr. N. S. 416; Rockwell v. Third Av. R. R. Co. 64 Barb. 438; 53 N. Y. 625; Fash v. Third Av. R. R. Co. 1 Daly, 148.
- 14 Conroy v. Twenty-third St. R. R. Co. 52 How. Pr. 49. See also McKenna v. Metropolitan R. R. Co. 112 Mass. 55.
- 15 Pittsburg etc. Railw. Co. v. Pittsburg, 80 Pa. St. 72. As to the duty of the company to keep in repair the pavement between its tracks: see Mayor etc. v. Troy etc. R. R. Co. 3 Lans. 270; McMahon v. Second Av. R. R. Co. 11 Hun, 347; Phila. v. Empire etc. Railw. Co. 3 Brewst. 570; St. Louis v. St. Louis R. R. Co. 50 Mo. 94; Passenger R. R. Co. v. Birmingham, 51 Pa. St. 41; People v. Fort St. etc. Railw. Co. 41 Mich. 413.
- 16 Hahn v. Southern Pacific R. R. Co. 51 Cal. 605; and see Culp v. Atchison etc. R. R. Co. 17 Kan. 475.

§ 266. Care towards passengers on street cars.—

A street railroad company is held to the exercise of a very high degree of care towards its passengers in carrying them through the streets of a city.¹ It is bound to exercise the utmost diligence in order to avoid collisions;² and with regard to persons getting on or alighting from its cars, it is bound to use every reasonable precaution.³ It is the duty of the company to cause its cars to come to a full stop for passengers to alight;⁴ and it is negligence to start the car before the passenger has stepped down, or has had a reasonable time to do so.⁵ The conductor of a street car is invested with implied authority to determine who may be admitted and who excluded from the car, and the company is liable for the wrongful exercise of this authority;⁶ but it will not be liable for the malicious excess of force and wanton injury by one of its conductors while ejecting a passenger for a refusal to pay fare.⁷ The company may, however,

be held liable in exemplary damages, for ejecting from its car a passenger who refuses to pay fare illegally exacted.⁸ The conductor has authority to stop his car and eject an unruly passenger;⁹ and may exercise such authority when the conduct or condition of the passenger is such as to render it reasonably certain that he will occasion discomfort or annoyance to other passengers.¹⁰ Whether it is due care to attempt such removal while the car is in motion is a question of fact for the jury.¹¹ It is not, under all circumstances, negligence, as matter of law, for a person to get upon or leap from a street car while in motion;¹² ordinarily, it is a proper case for the jury.¹³ But the law requires, on the part of a passenger, ordinary care and attention in protecting himself;¹⁴ and if it appears that he is riding on a car in a place of danger, his negligence is *prima facie* established, and the burden is upon him to rebut the presumption.¹⁵ But standing on the platform of a horse car, when there is no room inside, is not such contributory negligence on the part of a passenger as will prevent a recovery by him for injuries sustained in being thrown from the car by the negligence of the driver.¹⁶ And even when there is room inside, standing on the platform is not of itself conclusive evidence that the person injured by the driver's negligence was not in the exercise of due care.¹⁷

1 Clark v. Eighth Av. R. R. Co. 32 Barb. 657; 38 N. Y. 135; Chicago City Railw. Co. v. Young, 63 Ill. 238; Schierhold v. North Beach etc. R. R. Co. 40 Cal. 447; Barksdull v. New Orleans etc. R. R. Co. 23 La. An. 180.

2 Liddy v. St. Louis R. R. Co. 40 Mo. 506.

3 Chicago etc. R. R. Co. v. Stumps, 55 Ill. 367; Wheaton v. North Beach etc. R. R. Co. 36 Cal. 590; Pittsburg etc. Railw. Co. v. Caldwell, 74 Pa. St. 421.

4 Crissey v. Hestonville etc. Railw. Co. 75 Pa. St. 83; and see Murphy v. Union Railw. Co. 118 Mass. 228; Poulin v. Broadway etc. R. R. Co. 61 N. Y. 621.

5 Poulin v. Broadway etc. R. R. Co. 61 N. Y. 621; and see Drew v. Sixth Av. R. R. Co. 1 Abb. N. Y. App. 556; 3 Keyes, 429.

6 Higgins v. Watervliet Turnp. Co. 46 N. Y. 23; 7 Am. R. 293; Passenger R. R. Co. v. Young, 21 Ohio St. 518; 8 Am. R. 78; and see Isaacs v. Third Av. R. R. Co. 47 N. Y. 122; 7 Am. R. 418; Healey v. City Pass. R. R. Co. 28 Ohio St. 23.

7 *Sanford v. Eighth Av. R. R. Co.* 7 Bosw. 122; *Vanderbilt v. Richmond Turnp. Co.* 2 N. Y. 479; *Pittsburg etc. R. R. Co. v. Donahue*, 70 Pa. St. 119; *Crocker v. New London R. R. Co.* 24 Conn. 240. But compare *Cohen v. Dry Dock etc. R. R. Co.* 69 N. Y. 170; *Rounds v. Del. etc. R. R. Co.* 64 Id. 129; 21 Am. R. 597; *Indianapolis etc. Railw. Co. v. Anthony*, 43 Ind. 183.

8 *Balt. etc. Turnp. R. v. Boone*, 45 Md. 344. Compare *Turner v. North Beach etc. R. R. Co.* 34 Cal. 594.

9 *Westchester etc. R. R. Co. v. Miles*, 55 Pa. St. 209.

10 *Vinton v. Middlesex R. R. Co.* 11 Allen, 304; *Murphy v. Union Railw. Co.* 118 Mass. 228.

11 *Murphy v. Union Railw. Co.* 118 Mass. 228.

12 *Eppendorf v. Brooklyn City etc. R. R. Co.* 69 N. Y. 195; 25 Am. R. 171; *Wyatt v. Citizens' Railw. Co.* 35 Mo. 485; *Kelly v. Hannibal etc. R. R. Co.* 79 Id. 604; *Metticstadt v. Ninth Av. R. R. Co.* 4 Robt. 377. Compare *Dickson v. Broadway etc. R. R. Co.* 41 How. Pr. 151; *Texas etc. Railw. Co. v. Murphy*, 46 Tex. 336; 26 Am. R. 272; *Georgia R. R. Co. v. McCurdy*, 45 Ga. 288; 12 Am. R. 577.

13 *Eppendorf v. Brooklyn City etc. R. R. Co.* 69 N. Y. 195; 25 Am. R. 171.

14 *Sheridan v. Brooklyn etc. R. R. Co.* 38 N. Y. 39. One who is compelled to act at once, in the face of impending peril, cannot be held guilty of contributive negligence as a matter of law, merely because he did not choose the best means of escape; *Dyer v. Erie Railw. Co.* 71 N. Y. 228; *Morrison v. N. Y. Cent. R. R. Co.* 63 Id. 643; *Schultz v. Chicago etc. Railw. Co.* 44 Wis. 638; *Cottrill v. Chicago etc. Railw. Co.* 47 Wis. 634; 32 Am. R. 996.

15 *Ward v. Cent. Park etc. R. R. Co.* 11 Abb. Pr. N. S. 411; 1 Jones & S. 392; *Clark v. Eighth Av. R. R. Co.* 36 N. Y. 135; *Solomon v. Cent. Park etc. R. R. Co.* 1 Sweeny, 298.

16 *Ginna v. Second Av. R. R. Co.* 8 Hun. 494; 67 N. Y. 596; and compare *Augusta etc. R. R. Co. v. Renz*, 55 Ga. 126.

17 *Maguire v. Middlesex Railw. Co.* 115 Mass. 239; and compare *Lovett v. Salem etc. R. R. Co.* 9 Allen, 557; *Burus v. Bellefontaine R. R. Co.* 50 Mo. 133; *Wilton v. Middlesex R. R. Co.* 107 Mass. 108; 9 Am. R. 11; *Seigel v. Eisen*, 41 Cal. 109.

§ 267. **Duty of railway company towards employees.**—A railway company is bound to use all reasonable precautions for the safety of employees.¹ Thus, it is bound to exercise reasonable care in the construction and maintenance of a safe road-bed, track, engines, cars, appliances, and tools;² to employ attentive and competent persons in the various departments of its service;³ and to adopt such rules and regulations for running its trains as will insure safety.⁴ And for injuries sustained by employees, through the negligence of the company in any of these respects, it will be responsible.⁵ But if the negligence of the employee has in any important respect

contributed to the injury, he cannot recover against the company;⁶ nor can he recover, if injured while disregarding the instructions issued by the company for his guidance.⁷ And it is a well-settled general rule, that a railway company is not liable to one of its employees for an injury happening to him through the negligence or wrongful act of another employee engaged in the same general branch of the company's business,⁸ provided the company has not been negligent in the selection or retention of the employee at fault.⁹ All employees on a train, including conductors, are presumptively fellow-servants within the general rule.¹⁰ But the rule has no application where the employee receiving the injury is employed in a separate and disconnected branch of the business from that of the party by whose negligence the injury is caused;¹¹ as where a day laborer on the track of the company was run over and injured by an engine, through the carelessness of the company's engineer.¹²

1 Greenleaf v. Ill. Cent. R. R. Co. 29 Iowa, 14; Cooper v. Central R. R. 44 Ill. 134; Wedgwood v. Chicago etc. Railw. Co. 41 Wis. 473; Mobile etc. R. R. Co. v. Thomas, 42 Ala. 672; Fifield v. Northern R. R. Co. 42 N. H. 225; Morgan v. Vale of Neath Railw. Co. Law R. 1 Q. B. 145; 5 Best & Smith, 570.

2 Lewis v. St. Louis etc. R. R. Co. 59 Mo. 495; 21 Am. R. 385; Kirkpatrick v. N. Y. etc. R. R. Co. 79 N. Y. 240; Chicago etc. Railw. Co. v. Taylor, 69 Ill. 451; Porter v. Hannibal etc. R. R. Co. 60 Mo. 160; Salters v. Del. etc. Canal Co. 3 Hun. 338; 5 Thomp. & C. 553; Western etc. R. R. Co. v. Bishop, 50 Ga. 455; Plank v. N. Y. etc. R. R. Co. 1 Thomp. & C. 319; St. Louis etc. Railw. Co. v. Valerius, 56 Ind. 511; Jones v. N. Y. Cent. etc. R. R. Co. 22 Hun. 284.

3 New Orleans etc. R. R. Co. v. Hughes, 49 Miss. 258; Banlec v. N. Y. etc. R. R. Co. 5 Lans. 436; 59 N. Y. 356; Wonder v. Balt. etc. R. R. Co. 32 Md. 411; 3 Am. R. 143; Ala. etc. R. R. Co. v. Waller, 48 Ala. 459; Chapman v. Erie Railw. Co. 55 N. Y. 579.

4 Cooper v. Central R. R. 44 Iowa, 134; Hardy v. Carolinna etc. Railw. Co. 76 N. Car. 5; Brailley v. N. Y. etc. R. R. Co. 63 N. Y. 99; Pittsburg etc. R. R. Co. v. Powers, 74 Ill. 341.

5 See Lewis v. St. Louis etc. R. R. Co. 59 Mo. 495; 21 Am. R. 385; Wonder v. Balt. etc. R. R. Co. 32 Md. 411; 3 Am. R. 143; Gilman v. Eastern R. R. Co. 13 Allen, 433; Chicago etc. R. R. Co. v. Swett, 45 Ill. 197.

6 Muldowney v. Ill. etc. R. R. Co. 39 Iowa, 615; Evans v. Atlantic etc. R. R. Co. 63 Mo. 49; Western etc. R. R. Co. v. Adams, 55 Ga. 279; Sprong v. Boston etc. R. R. Co. 60 Barb. 30; Railroad Co. v. Jones, 95 U. S. 439; Archibson etc. R. R. Co. v. Bedford, 18 Kan. 245; Owen v. N. Y. etc. R. R. Co. 1 Lans. 103; Leclair v. First Div. etc. R. R. Co. 20 Minn. 9; Compare Ford v. Fitchburg R. R. Co. 110 Mass. 240; Georgia R. R. Co.

v. Rhodes, 86 Ga. 645; *Steele v. Central R. R.* 43 Iowa, 109; *Lyon v. Detroit R. R. Co.* 31 Mich. 429.

7 *Memphis etc. R. R. Co. v. Thomas*, 51 Miss. 637.

8 *Weger v. Penn'a R. R. Co.* 55 Pa. St. 469; *Hough v. Railw. Co.* 109 U. S. 213; *Mad River etc. R. R. Co. v. Barber*, 5 Ohio St. 541; *Columbus etc. Railw. Co. v. Arnold*, 31 Ind. 174; *Yeomans v. Contra Costa etc. Co.* 44 Cal. 71; *Davis v. Detroit etc. R. R. Co.* 20 Mich. 103; 4 Am. R. 364; *Pittsburg etc. Railw. Co. v. Ruby*, 38 Ind. 294; 10 Am. R. 111; *Osborne, v. Knox etc. R. R.* 68 Mo. 49; 23 Am. R. 16; *Shipp v. Eastern Counties Railw. Co.* 9 Ex. 223; *Hutchinson v. York etc. Railw. Co.* 5 Id. 343; *Degg v. Midland Railw.* 1 Hurl. & N. 773.

9 *Howd v. Miss. Cent. R. R. Co.* 50 Miss. 178; *Baulec v. N. Y. etc. R. R. Co.* 49 How. Pr. 399; 52 N. Y. 633; *S. C. again*, 59 Id. 256; 17 Am. R. 325; *Ala. etc. R. R. Co. v. Waller*, 48 Ala. 459; *Tyson v. Railroad Co.* 61 Id. 554; 32 Am. R. 8.

10 *McGowan v. St. Louis etc. R. R. Co.* 61 Mo. 523; and see *Moran v. N. Y. etc. R. R. Co.* 67 Barb. 98; *Union Pacific R. R. Co. v. Young*, 8 Kan. 638; *Lawler v. Androscoggin R. R. Co.* 62 Me. 463; 16 Am. R. 492; *Laning v. N. Y. etc. R. R. Co.* 49 N. Y. 521; *Ross v. N. Y. etc. R. R. Co.* 5 Hun, 433; *Foster v. Minn. etc. Railw. Co.* 14 Minn. 360.

11 *Nashville etc. R. R. Co. v. Carroll*, 6 Helsk. 347; *Pittsburg etc. R. R. Co. v. Powers*, 74 Ill. 341.

12 *Toledo etc. R. R. Co. v. O'Connor*, 77 Ill. 391; and see *McKnight v. Iowa etc. R. R. Co.* 43 Iowa, 406; *Ryan v. Chicago etc. Railw. Co.* 60 Ill. 171; 14 Am. R. 32. But compare *Ryan v. Cumberland Valley R. R. Co.* 23 Pa. St. 384.

§ 268. **Leases of railroads.**—One railway company cannot lease the entire use of its road to another company without the consent of the legislature;¹ and a court of equity will not aid in enforcing a lease of a railroad made without such consent.² The English courts have even restrained railway companies from carrying such contracts into effect.³ But under a grant of authority from the legislature to do so, a railway company may lease its corporate works and property, with its franchises, to another company, and such lease will be valid.⁴ And under an authority to a railway company to take a lease of any railroad that might be connected with its own, it may take a lease of a competing road, if, when united, the two roads are capable of forming a continuous line.⁵ And an unrestricted power granted to a company to farm out its road was construed to authorize a lease, with power to the lessee to change the gauge of the road.⁶ But a lease made by the company for the purpose of extending its road beyond the *terminus* fixed by its charter is *ultra*

vires and void, as against public policy.⁷ A railway company leasing its road, even by consent of the legislature, does not thereby escape all responsibility to the public;⁸ and this is clearly so in the absence of statutory authority to lease its road.⁹ It is, however, held that the company lessee, under a lease authorized by statute, may, in respect to its traffic on the road, be held to the rule of liability imposed by law on the company leasing;¹⁰ and that it cannot dispute its liability on the ground that the lease is void.¹¹ So the company lessee is in general bound by all the prohibitions and limitations contained in the charter of the company leasing, as well as entitled to all its rights and franchises;¹² but it does not take the property and franchise, subject to an existing liability for an injury caused by negligence which occurred prior to the lease.¹³ Where the lease contains a covenant that the lessee shall keep up the fences, the leasing company is not liable to one traveling upon the highway for damages resulting from an omission of the lessee to repair a fence which was in good order at the time of the lease and surrender of possession to the lessee.¹⁴ A lease by one company to another of its road for a hundred years does not vest in the lessee any power to exercise the right of eminent domain, but that power remains in the lessor.¹⁵

1 *Troy etc. R. R. Co. v. Kerr*, 17 Barb. 581; *Black v. Del. etc. Canal Co.* 22 N. J. Eq. 399; *Thomas v. Railroad Co.* 101 U. S. 71; *Shrewsbury etc. Railw. v. London etc. Railw.* 4 De Gex, M. & G. 115; 6 H. L. Cas. 113; and see *Richardson v. Sibley*, 11 Allen, 67.

2 *Johnson v. Shrewsbury etc. Railw. Co.* 3 De Gex, M. & G. 914.

3 *Beman v. Rufford*, 1 Sim. N. S. 550; *West London etc. Railw. v. London etc. Railw.* 11 Com. B. 327; *London etc. Railw. v. Southeastern Railw. Co.* 8 Ex. 584.

4 *Black v. Del. etc. Canal Co.* 24 N. J. Eq. 455; *Kent Coast Railw. Co. v. London etc. Railw. Co.* Law R. 3 Ch. 636; *Phila. etc. R. R. Co. v. Catawissa R. R. Co.* 53 Pa. St. 20; *Peters v. Boston etc. R. R. Co.* 114 Mass. 127; *Central R. R. Co. v. Macon*, 43 Ga. 605.

5 *Wallace v. Long Island R. R. Co.* 12 Hun, 460.

6 *State v. Richmond etc. R. R. Co.* 72 No. Car. 634.

7 *Union Bridge Co. v. Troy etc. R. R. Co.* 7 Lans. 240.

8 *Nelson v. Vermont etc. Railw.* 26 Vt. 717; and see *Clement v. Canfield*, 28 Id. 302; *Parker v. Rensselaer etc. Railw.* 16 Barb. 515; *Id.*

gersoll v. Stockbridge etc. R. R. Co. 8 Allen, 433; Whitney v. Atlantic etc. R. R. Co. 41 Me. 362; Wyman v. Penobscot etc. R. R. Co. 46 Id. 162; York etc. Railw. v. Winans, 17 How. 39; Railroad Co. v. Brown, 17 Wall. 445; Pittsburg etc. R. R. Co. v. Hannon, 80 Ind. 417; Maron etc. R. R. Co. v. Mayes, 49 Ga. 353; 15 Am. R. 673. But compare Mills v. Orango etc. R. R. Co. 1 McAr. 283; Nashville etc. R. R. Co. v. Carroll, 6 Heisk. 347.

9 Abbott v. Johnstown etc. Horse R. R. Co. 9 N. Y. Week. Dig. (Ct. App.) 544; 80 N. Y. 27.

10 McMillan v. Mich. etc. R. R. Co. 16 Mich. 79. See also Langley v. Boston etc. R. R. Co. 10 Gray, 163; Ohio etc. R. R. Co. v. Dunbar, 20 Ill. 623.

11 McCluer v. Manchester etc. R. R. 13 Gray, 124.

12 Penn'a R. R. Co. v. Sly, 65 Pa. St. 205; and see Linfield v. Old Colony R. R. Co. 10 Cush. 562.

13 Pittsburg etc. Railw. Co. v. Kain, 35 Ind. 291; and compare Pittsburg etc. R. R. Co. v. Harbaugh, 4 Brewst. 115.

14 Ditchett v. Spuyten Duyvil etc. R. R. Co. 67 N. Y. 423. See § 253, *ante*.

15 Mayor etc. v. Norwich etc. R. R. Co. 109 Mass. 103.

§ 269. Remedies.—An action at law is, in many cases, the proper remedy against a railway company;¹ and especially in cases where the company has been guilty of negligence, or want of skill, in the exercise of its legal rights.² So an action lies against a railway company for unlawfully entering upon and appropriating land for its road.³ But as a general rule, where the company proceeds, in the exercise of the right of eminent domain, to take land for railroad right of way, the remedy provided by statute for the assessment of damages is exclusive of all other remedies for that purpose, and the landowner cannot resort to a common-law action.⁴ A railway company may be sued in trespass for assault and battery.⁵ And for wrongfully refusing to receive and transport freight, a railway company is liable in an action at law, at the suit of the party aggrieved, and the remedy is not by mandamus.⁶ The measure of damages in such action is the difference between the value of the property at the place where it was tendered and its value at the place to which it was to be taken, less the expenses of transportation.⁷ Where a landowner relinquishes his right of way over his land to a railway company, on its engagement to locate the depot on a certain spot, his

remedy for the failure of the company to do so is by action for the breach of contract, or by suit for specific performance.⁸ In some cases, relief against a railway company must be sought in a court of equity; as where the company is acting in excess of its powers, and an injunction is issued to restrain it.⁹ So if the company neglect to pay the damages awarded to the landowner for the right of way, it may be restrained by injunction from using the land until the damages are paid.¹⁰ And this remedy lies at the suit of an abutting house-owner, to enjoin a street railway company from leaving the snow which it removes from its tracks heaped up between them and the plaintiff's premises for a longer time than is reasonably necessary for its removal.¹¹

¹ See §§ 147, 255-60, *ante*.

² *Perley v. Railroad Co.* 57 N. H. 212; *Little Miami R. R. Co. v. Naylor*, 2 Ohio St. 235; *Tenn. etc. R. R. Co. v. Adams*, 3 Head, 596; and see *Estabrooks v. Peterborough etc. R. R. Co.* 12 Cush. 224.

³ *Sherman v. Milwaukee etc. R. R. Co.* 40 Wis. 645; *Kansas Pacific R. R. Co. v. Hopkins*, 18 Kan. 494; *Anderson etc. R. R. Co. v. Kernodle*, 54 Ind. 314; *Powers v. Hurmurt*, 51 Mo. 136; and see § 248, *ante*.

⁴ *Tenn. etc. R. R. Co. v. Adams*, 3 Head, 596; *Sherman v. Milwaukee etc. R. R. Co.* 40 Wis. 645; *East & West India etc. R. R. Co. v. Gattke*, 3 Marc. & G. 155. But compare *Kennett Nav. Co. v. Witherington*, 18 Q. B. 531.

⁵ *Mason v. Kennebec etc. R. R. Co.* 31 Me. 215. See § 248, *ante*.

⁶ *People v. N. Y. etc. R. R. Co.* 22 Hun, 533. Compare *Chicago etc. R. R. Co. v. People*, 56 Ill. 365.

⁷ *People v. N. Y. etc. R. R. Co.* 22 Hun, 533.

⁸ *Hubbard v. Kansas City etc. R. R. Co.* 63 Mo. 68.

⁹ See *Stone v. Commercial R. R.* 9 Sim. 621; *Bohlman v. Green Bay etc. R. R. Co.* 30 Wis. 105; *Saulford v. Catawissa etc. R. R. Co.* 24 Pa. St. 378; § 148, *ante*.

¹⁰ *Ross v. Elizabeth etc. R. R. Co.* 2 N. J. Eq. 422. Compare *Chicago etc. R. R. Co. v. Davis*, 86 Ill. 20.

¹¹ *Prime v. Twenty-third St. R. R. Co.* 1 Abb. N. C. 63. Compare *Short v. Balt. City etc. R. R. Co.* 50 Md. 73; 33 Am. R. 298.

CHAPTER XX.

RELIGIOUS SOCIETIES.

- § 270. Nature of, in general.
- § 271. How incorporated.
- § 272. Name.
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- § 276. Contracts.
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- § 283. Expulsion of members.
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§ 270. Nature of, in general.—Religious corporations or societies existing by statute in most of the states of the Union are not ecclesiastical corporations in the sense of the English law.¹ They are rather to be regarded as civil corporations, to be controlled and managed according to the principles of the common law.² Under the New York statute,³ a religious corporation consists of the members of the society.⁴ The members of the society, whether church members or not, are the corporators;⁵ and the trustees are but the managing officers of the corporation, invested, as to the temporal affairs of the society, with the powers specifically conferred by the statute, and with the ordinary discretionary powers of officers of civil corporations.⁶ So under the New Jersey statute, the congregation are the substantial beneficial owners of the church property, and the trustees are the legal instruments to execute the will of the congrega-

tion.⁷ They are trustees in the same sense with the president and directors of a bank or of a railroad company.⁸ The Illinois statute makes the trustees of any religious society the corporate body, and they alone can bind the society by the assumed name.⁹ Among Christians, whose polity is congregational or independent, a distinction is made between a "church" and a "society"; and the former comprises those who are associated together, not only for the purpose of maintaining worship, but the sacraments as well.¹⁰ Each body is entirely independent, and the existence of the "church" proper as an organized body is not recognized by the law.¹¹ The legal tribunals of the state have no jurisdiction over the church, or the members thereof, as such,¹² except to preserve the peace and protect the civil rights of all persons connected with the body;¹³ and such tribunals will not, of course, interfere to compel an individual to attend worship at any place, nor to remain connected with any church, nor to receive any one as his pastor.¹⁴

1 See § 6, *ante*. The position of the church of England in a colony which has an established legislature, but where no church is established by law, is that of a voluntary association: *Colenso v. Gladstone*, Law R. 3 Eq. l. See *Long v. Gray*, 1 Moore P. C. C. (N. S.) 411; *Ex parte Jenkins*, Law R. 2 P. C. 258.

2 *Robertson v. Bullions*, 11 N. Y. 243; *Watkins v. Wilcox*, 4 Hun, 220; 6 Thomp. & C. 539; *People v. Church of Atonement*, 48 Barb. 603; and see *Smith v. Nelson*, 18 Vt. 511.

3 Rev. Laws, 1813, ch. 60, § 16; 3 Edm. Stat. 695.

4 *Robertson v. Bullions*, 11 N. Y. 243; 9 Barb. 64, 87.

5 *Robertson v. Bullions*, 11 N. Y. 243; *Baptist Church v. Witherell*, 3 Paige, 296; *Wyatt v. Benson*, 4 Abb. Pr. 182; 23 Barb. 327.

6 *Gram v. Prussia etc. Soc.* 36 N. Y. 161; *Burrell v. Assoc. Ref. Church*, 44 Barb. 282.

7 *Worrell v. First Presby. Church*, 23 N. J. Eq. 96; and see *Doremus v. Dutch Ref. Church*, 3 *id.* 332.

8 *Robertson v. Bullions*, 11 N. Y. 243; *Watkins v. Wilcox*, 4 Hun, 220; 6 Thomp. & C. 539.

9 *Little v. Bailey*, 87 Ill. 239.

10 *Silby v. Barlow*, 16 Gray, 329; and see *Jefts v. York*, 10 Cush. 392; *Weid v. May*, 9 *id.* 181.

11 *Petty v. Tooker*, 21 N. Y. 267. But compare *Sawyer v. Baldwin*, 11 Pick. 492.

12 *Sawyer v. Clipperly*, 7 Paige, 391; *Baptist Church v. Witherell*, 3 *id.* 296.

13 *Grimes v. Harmon*, 25 Ind. 196; *Watson v. Avery*, 2 Busl. 332; *Lucas v. Case*, 9 Id. 297; *State v. Hebrew Cong.* 30 La. An. 306; 32 Am. R. 217.

14 *Felzel v. Trustees etc.* 9 Kan. 532.

§ 271. **How incorporated.**—Religious societies are incorporated under general statutes enacted in the different states authorizing their formation.¹ The provisions of the statute should be substantially followed, and its express requirements complied with;² but for some purposes, the formal requisites to organization under the statute will be presumed, although they do not appear by the certificates filed.³ And it is not necessarily fatal to the validity of the certificate, as recorded, that it does not appear to have had seals attached.⁴ Incorporation is sufficiently proved by showing a certificate of organization, and acts of user under it.⁵ And a mere association of persons for religious purposes, and to maintain public worship, formed under the direction and advice of ministers and elders of their denomination, were held to constitute a religious society, competent as such to take grants or donations, and to prosecute actions of trespass.⁶ Reincorporation of a religious society may be had under the New York statute, not only after a formal dissolution of the old corporation, but also where it has become practically dissolved by a neglect to elect trustees.⁷

1 See *Meth. E. Church v. Sherman*, 36 Wis. 404; *Hale v. Everett*, 53 N. H. 9; 16 Am. R. 82; *Ada St. M. E. Church*, 66 Ill. 132; *Att.-Gen. v. Clergy Soc.* 8 Rich. Eq. 190; *Van Buren v. Ref. Church*, 62 Barb. 435.

2 *Ferraria v. Vasconcelles*, 23 Ill. 456. See § 21, *ante*.

3 *All Saints' Church v. Lovett*, 1 Hall, 191.

4 *St. Jacob's Luth. Church v. Bly*, 73 N. Y. 323.

5 *Willard v. Meth. E. Church*, 66 Ill. 55; and see *Meth. E. Church v. Pickett*, 19 N. Y. 482; *Paddock v. Brown*, 6 Hill, 530.

6 *Christian Soc. etc. v. Macomber*, 5 Met. 155. Compare *Hamblett v. Bennett*, 6 Allen, 140; *M. E. Union Church v. Pickett*, 19 N. Y. 482; *Newark M. E. Church v. Clark*, 41 Mich. 730; *White v. Miller*, 71 N. Y. 118.

7 *First Soc. etc. v. Brownell*, 5 Hun, 464.

§ 272. **Name.**—The name of a religious society may be changed without thereby affecting the identity of the

corporation;¹ and it is not necessary that all the incorporators should be heard upon the application for change of name.² The fact that a religious sect assumes a strictly sectarian or denominational name, affords a presumption that it was formed for the purpose of promoting the vital and fundamental doctrines of such sect.³ And the corporate name of the society will be presumed to be the one in which a mortgage was executed by the trustees.⁴

1 *Cahill v. Bigger*, 8 Mon. B. 211; *First Soc. etc. v. Brownell*, 5 Hun, 464; and see *Wardens etc. v. Hall*, 22 Conn. 123; *Episcopal etc. Soc. v. Episcopal Church*, 1 Pick. 372. See § 31, *ante*.

2 *Watkins v. Wilcox*, 4 Hun, 220; 6 *Thomp. & C.* 539; 66 N. Y. 654.

3 *Dublin Case*, 28 N. H. 459; *Hale v. Everett*, 53 N. H. 9; 16 Am. R. 82.

4 *Kendallville M. E. Church v. Schulze*, 61 Ind. 511.

§ 273. Membership.—Membership in a religious society may be acquired by stated attendance on divine worship therein, and contributing towards its support.¹ And the right of a member to vote at a corporate election depends on his membership in the particular society,² and not on his connection with the denomination to which the society belongs.³ One who withdraws from a religious society does not continue a member thereof, simply because he holds the same religious faith and tenets with the members of that society.⁴ But it is not a withdrawal from membership in the society for members thereof to meet for worship or the transaction of church business in some other building than the church edifice of the society.⁵

1 *People v. Tuthill*, 31 N. Y. 550; and see § 28, *ante*. None are deemed parishioners in the Episcopal Church, except those who receive communion in the parish, with the consent of the incumbent; *Groesbeck v. Dunsmomb*, 41 How. Pr. 302.

2 *Watkins v. Wilcox*, 4 Hun, 220; 6 *Thomp. & C.* 539; 66 N. Y. 654.

3 *Watkins v. Wilcox*, 4 Hun, 220; 6 *Thomp. & C.* 539; 66 N. Y. 654.

4 *Den v. Bolton*, 12 N. J. L. 206.

5 *Perry v. Tupper*, 74 No. Car. 722; *Bouldin v. Alexander*, 15 Wall. 131. See, as to resignation of membership: *Marks v. Cong. Daruch Amuno*, 5 Daly, 8; *People v. Farrington*, 22 How. Pr. 294; *Jones v. Cary*, 6 Me. 448.

§ 274. **Rights of majority.**—The affairs of a religious society are in general determined by the will of the majority;¹ and especially in respect to temporalities of the society, the majority must govern, and the minority must submit or withdraw.² A majority may dispose of the church property to pay the debts of the society, when necessary for that purpose;³ and may change the denomination of the church, and the mode of worship, as they see fit.⁴ Nor is the right of the majority to the property of the society affected by a change of doctrine shown to be a departure from the belief of the majority at the time the property was purchased.⁵ But it was held that the charter of a church will not be so amended as to involve an alteration of its original principles, although asked by a majority, if the minority object.⁶

1 *Petty v. Tooker*, 21 N. Y. 267; *Watkins v. Wilcox*, 4 Hun. 220; 6 Thomp. & C. 539; 66 N. Y. 634; *Sutter v. Trustees etc.* 42 Pa. St. 503.

2 *Miller v. English*, 1 Zab. 317. Compare *Trustees v. Bly*, 73 N. Y. 323, 329.

3 *Eggleston v. Doolittle*, 33 Conn. 396.

4 *Parish of Bellport v. Tooker*, 29 Barb. 256; *Watkins v. Wilcox*, 4 Hun. 220; 6 Thomp. & C. 539; 66 N. Y. 634. The compromise of a suit by a majority binds the minority: *Horton v. Baptist Church etc.* 34 Vt. 309.

5 *Keyser v. Stansifer*, 6 Ohio, 363.

6 *Matter of Hebron etc. Church*, 9 Phila. 609. Compare *Sutter v. Trustees etc.* 42 Pa. St. 503.

§ 275. **Property rights.**—What property may be acquired by religious societies, the mode of acquisition, and the right of the society to control and dispose of its property, are matters regulated to a great extent by the statutes of incorporation.¹ In general, the trustees of the society have the possession and control of the temporalities,² and it is the duty of the courts to protect them against every irregular and unlawful intrusion made against their will, whether by the pastor, members of the congregation, or by strangers.³ In New York, either real or personal property may be held in trust for the use of an unincorporated religious society, without restriction as to time, except that upon the lawful incorporation of the

society the title vests in the corporation.⁴ The trust may be shown by parol as well as by deed;⁵ and the same rule governs as to personal property held by an incorporated religious society, for the use of an unincorporated one, as if it were held by natural persons.⁶ In the absence of any restraining statute, a religious society has power to mortgage its personal property to secure its debts.⁷ But it cannot sell and convey its real property without the authority of some enabling statute;⁸ and an unauthorized conveyance by the society of its real property cannot be held valid, although fully executed by delivery of possession and receipt of the purchase-money.⁹ And to constitute a sale of the real property of a religious society, within the meaning of the New York statute, there must be a valuable consideration inuring to the corporation as such.¹⁰ A religious society may acquire title to real estate by adverse possession, under color of title.¹¹ Land bought and paid for by individuals for the use of a religious society intended to be formed, the title to which the vendor retains, is held in trust for the society when incorporated.¹² In Massachusetts, a deed of land to a religious society, although unincorporated, vests a valid title in the grantees as a body.¹³ The property of an extinct religious corporation vests in the former individual members thereof.¹⁴ What are known as 'glebe lands' are the property of the parish in its aggregate capacity, and when sold, the proceeds become parochial property.¹⁵

1 See *Worrell v. First Presby. Church*, 23 N. J. Eq. 96; *Cong. Beth Elohim v. Cent. Presby. Church*, 10 Abb. Pr. N. S. 484; *Hale v. Everett*, 53 N. H. 9; 16 Am. R. 82; § 40, *ante*.

2 *Burrell v. Assoc. Ref. Church*, 44 Barb. 282; *Meth. Epis. Church v. Filkins*, 3 Thomp. & C. 279; *German etc. Cong. v. Pressler*, 17 La. An. 127; *Green v. Cady*, 9 Wend. 414; *People v. Runkel*, 9 Johns. 147.

3 *German etc. Cong. v. Pressler*, 17 La. An. 127.

4 *Church of the Redemption v. Grace Church*, 6 Hun. 166; 63 N. Y. 570. See also *Dutch Church v. Veeder*, 4 Wend. 494; *Van Deuzen v. Presby. Cong.* 3 Keyes. 550; 4 Abb. N. Y. App. 465; *Alexander Presby. Church v. Presby. Church*, 64 N. Y. 274.

5 *Foot v. Bryant*, 47 N. Y. 544.

6 *Church of the Redemption v. Grace Church*, 63 N. Y. 570.

7 *Walrath v. Campbell*, 23 Mich. 111. Compare *South Baptist Church v. Clapp*, 18 Barb. 35; *Manning v. Moscow Presby. Soc.* 27 Id. 52.

8 *Madison Avenue etc. Church v. Baptist Church*, 11 Abb. Pr. N. S. 132; 46 N. Y. 131. Compare *Church of St. Bartholomew v. Wood*, 80 Pa. St. 219; *Gohler v. Trinity Church*, 109 Mass. 1; *Van Houten v. First Ref. Dutch Church*, 17 N. J. Eq. 126.

9 *Madison Avenue etc. Church v. Baptist Church*, 9 Jones & S. 369; 73 N. Y. 82.

10 *Madison Avenue etc. Church v. Baptist Church*, 11 Abb. Pr. N. S. 132; 46 N. Y. 131.

11 *Ref. Church v. Schoolcraft*, 65 N. Y. 134; *Matter of Roman Catholic Soc.* 4 Laus. 14.

12 *Newmyer's Appeal*, 72 Pa. St. 121; *African M. E. Church v. Conover*, 27 N. J. Eq. 157.

13 *Hamblett v. Bennett*, 6 Allen, 140; and see *Cooper v. Trustees etc.* 32 Barb. 222; *Van Deuzen v. Presby. Cong.* 3 Keyes, 550; 4 Abb. N. Y. App. 465. But see *Bundy v. Birdsall*, 29 Barb. 31; *Meth. Soc. v. Bennett*, 39 Conn. 253.

14 *Burke v. Wall*, 29 La. An. 38.

15 *Mason v. Muncaster*, 9 Wheat. 445, 468; and see *Selden v. Overseers etc.* 11 Leigh, 127; *Turpin v. Locket*, 6 Call, 113.

§ 276. **Contracts.**—In the absence of evidence as to the manner in which a religious society makes contracts, it will be presumed that the trustees are empowered to bind it by contract;¹ but they must act jointly, delegate their power, or ratify the acts of one or more of them.² The separate action of the trustees, though a majority in number, creates no corporate liability.³ But a contract with a board of trustees *de facto*, in possession, made by one having no knowledge of an illegality in their election, is binding on the corporation.⁴ And a mortgage executed by all the trustees, to secure a debt of the society, is binding on the corporation, without a formal resolution of the board.⁵ A church society accepting the services of a sexton may become liable to him therefor;⁶ but it is otherwise if the evidence clearly shows that the performance of the duty was voluntary, and that it was supposed on both sides that his service was something he was spontaneously giving.⁷ So church music in small country villages or hamlets is usually gratuitous;⁸ and to authorize a recovery for services as an organist, an actual employment of the plaintiff by the defendant must be shown, and a promise, binding on the corporate body, to pay the plaintiff for the service.⁹

1 St. Patrick's Church v. Gavalon, 82 Ill. 170; 25 Am. R. 305. Compare Baptist Cong. v. Scannel, 3 Grant Cas. 48; Constant v. St. Albans Church, 4 Daly, 305; M. E. Church v. Sherman, 36 Wis. 404.

2 St. Patrick's Church v. Gavalon, 82 Ill. 170; 25 Am. R. 305.

3 Constant v. St. Albans Church, 4 Daly, 305; and see United Brethren Church v. Vandusen, 37 Wis. 54.

4 Ebaugh v. German Ref. Church, 3 Smith, E. D. 60. Compare Presby. Soc. v. Smithers, 12 Ohio St. 248.

5 Manning v. Moscow Presby. Soc. 27 Barb. 52. See Kendallville M. E. Church v. Schulze, 61 Ind. 511.

6 St. Patrick's Church v. Abst, 76 Ill. 252.

7 St. Jude's Church v. Denberg, 31 Mich. 287.

8 See Van Buren v. Ref. Church, 62 Barb. 495.

9 Van Buren v. Ref. Church, 62 Barb. 495.

§ 277. Subscriptions.—Voluntary subscriptions for charitable or religious objects are valid and binding in law;¹ the implied undertaking of the promisee, to appropriate the funds subscribed in conformity with the terms and objects of the subscription, being deemed a sufficient consideration, in the absence of any other, for the promise of the subscriber.² And where several persons, having in view the organization of a religious society, unite in subscribing the necessary funds, the promise of each subscriber is a sufficient consideration for those of the others,³ and the money subscribed may be recovered by the trustees, after incorporation.⁴ So, if a subscription is made upon condition that a certain additional amount shall be obtained, the labor and expense incurred in obtaining such amount is a good consideration for the subscription.⁵ And if a party, by the promise of a subscription, encourages a congregation to go on and erect a church edifice in a specified locality, the congregation can maintain an action on the promise.⁶ And notice given by one who has made a valid unconditional subscription, that he revokes it and will not pay, does not operate to release him.⁷ And notice given by a subscriber to a treasurer to whom the subscription has been paid, not to pay it over, will not protect the treasurer from a recovery against him by the society.⁸ And in an action on a subscription it is not competent for the subscriber to

prove that he signed merely upon the assurance of the agent that he wanted his signature to influence others, and that he would never be called upon to pay the subscription.⁹ But a promise to subscribe, made to one having no authority to act as agent for the society in soliciting subscriptions, may be retracted at any time before it has been accepted by a vote of the society, or by an authorized agent.¹⁰

1 See *Lathrop v. Knapp*, 27 Wis. 214; *Trustees v. Garvey*, 53 Ill. 401; 5 Am. R. 51; *Williams College v. Danforth*, 13 Pick. 541; *Cooper v. McCrimmin*, 33 Tex. 383; 7 Am. R. 268; *Barnes v. Perine*, 12 N. Y. 13. Compare *Curry v. Rogers*, 21 N. H. 247; *Galt v. Swain*, 9 Gratt. 633.

2 *M. E. Church v. Garvey*, 53 Ill. 401; 5 Am. R. 51; *Ladies' Collegiate Inst. v. French*, 16 Gray, 196; *North Ecclesiastical Soc. v. Matson*, 26 Conn. 26; *Northwestern Conference v. Myers*, 36 Ind. 375; *Caul v. Gibson*, 3 Pa. St. 416.

3 *Reformed Church v. Brown*, 4 Abb. N. Y. App. 31; 24 How. Pr. 76; *Christian College v. Handley*, 49 Cal. 347.

4 *Christian College v. Handley*, 49 Cal. 347; *Willard v. M. E. Church*, 68 Ill. 55; *Wilson v. First Presby. Church*, 56 Ga. 554.

5 *Kentucky etc. Soc. v. Carter*, 73 Ill. 247.

6 *Ryers v. Cong. of Blossburg*, 32 Pa. St. 114.

7 *Snell v. M. E. Church*, 68 Ill. 290; *Wilson v. First Presby. Church*, 56 Ga. 554.

8 *Church of the Redeemer v. Crawford*, 43 N. Y. 476.

9 *Blodgett v. Merrill*, 20 Vt. 509.

10 *M. E. Church v. Sherman*, 36 Wis. 404.

§ 278. **Effects of divisions and secessions.**—Where property has been dedicated by way of trust, to the support of a specific religious belief, it is the duty of the court to see that the property so dedicated is not diverted from this purpose.¹ And in order to ascertain which of the divisions of the church adheres to the faith which the donor desired by his gift to sustain, it will be proper for the court to inquire into questions of religious belief and practice.² If each of the two divisions adheres to such faith, so that the administration of the property by either would be an execution of the trust on which it was given, the property should be shared between them, in proportion to their numbers at the time of the division.³ In cases involving property acquired in any of the

usual modes for the general use of a religious society, and free of any special trust in favor of particular tenets, the title to the church property of a divided congregation is in that part which is acting in harmony with its own laws;⁴ and the ecclesiastical laws, etc., which were accepted among them before the suit began, constitute the standard for determining which party is right.⁵ When questions of discipline, or of faith, or ecclesiastical law, have been decided by the highest church judicatory to which the matter has been carried, the civil courts must accept such decisions as final, and as binding on them, in their application to the case in hand.⁶

1 *Watson v. Jones*, 13 Wall. 679; *M. E. Church v. Wood*, 5 Ohio, 283; *Assoc. Ref. Church v. Theolog. Sem.*, 4 N. J. Eq. 77; *Schnorr's Appeal*, 67 Pa. St. 138; 5 Am. R. 415; *Kinkaid v. McKee*, 2 Bush, 535; *Swedesborough Church v. Shivers*, 16 N. J. Eq. 453; *Dublin Case*, 38 N. H. 459. Compare *Trustees v. Sturgeon*, 9 Pa. St. 321.

2 *Hale v. Everett*, 53 N. H. 9; 16 Am. R. 82. See also *Att.-Gen. v. Pearson*, 3 Mer. 400; *Att.-Gen. v. Clapham*, 10 Hare, 540.

3 *Nicolls v. Rugg*, 47 Ill. 47; and see *Brooks v. Shacklett*, 13 Gratt. 301; *Gartin v. Penick*, 5 Bush, 110; *Nelson v. Benson*, 69 Ill. 27.

4 *Roshi's Appeal*, 69 Pa. St. 462; *Ferraria v. Vasconcelles*, 23 Ill. 456; *Lewis v. Watson*, 4 Bush, 228; *Bouldin v. Alexander*, 15 Wall. 131; *Trustees etc. v. Seaford*, 1 Dev. Eq. 453.

5 *McGinnis v. Watson*, 41 Pa. St. 9; *Roshi's Appeal*, 69 Id. 462.

6 *Watson v. Jones*, 13 Wall. 679; and see *Venable v. Coffman*, 2 W. Va. 310; *M. E. Church v. Adams*, 4 Oreg. 76; *Newman v. Proctor*, 10 Bush, 318; *Harper v. Straws*, 14 Mon. B. 48; *Harrison v. Hoyle*, 24 Ohio St. 254; *Schmidt v. Hess*, 60 Mo. 591.

§ 279. **Pews and pew-owner.**—In England, the right to a pew in a church can only exist by faculty or by prescription;¹ and in an action for disturbance in the enjoyment of it, the plaintiff must prove a prescriptive right, or a faculty, and should claim it in his declaration as appurtenant to a messuage in the parish.² Every parishioner has a right to be seated, but not to a pew;³ and non-parishioners have no right to a pew or a sitting, except by prescription.⁴ The church wardens alone have the regulation of the pews in a parish church,⁵ and have a discretionary power to appropriate them among the parishioners, and may remove persons intruding on seats already appropriated.⁶ The door of a pew hung upon

hinges, and removable without interfering with the staple, is a chattel, and not part of the freehold.⁷ In this country, the owners of pews in a meeting-house belonging to a religious society have only an easement in the freehold.⁸ It is an exclusive right to occupy a certain part of the meeting-house for the purpose of attending upon public worship, and for no other purpose.⁹ And the right is subordinate to the power of the aggregate body to remodel the building, or to sell it as an entirety, on deciding to remove.¹⁰ The sale of a pew in a church for an unlimited period is a sale of an interest in real estate, and must be in writing under the statute of frauds;¹¹ but a sale of pews is held not to be a sale of real estate within a statute requiring the sanction of the court to a sale of real property of a religious society.¹² Trespass lies for disturbing the owner of a pew in its possession;¹³ even against the society or person in whom the title to the land and building is vested;¹⁴ but not for the mere breaking and entry of the edifice in which the pew is situated.¹⁵ Where neither claimant to a pew has any legal title thereto, the one in possession will not be disturbed.¹⁶

1 *Morgan v. Curtis*, 3 Mees. & R. 339; and see *Griffith v. Matthews*, 5 Term Rep. 256; *Hallack v. Cambridge University*, 1 Q. B. 593; 1 Gale & D. 100; 9 Dowl. P. C. 683; *Church v. Wells*, 24 Pa. St. 249.

2 *Stocks v. Booth*, 1 Term Rep. 428; *Mainwaring v. Giles*, 5 Barn. & Adol. 356; and see *Parker v. Leach*, 4 Moore P. C. C. (N. S.) 1180; *Crisp v. Martin*, Law R. 2 Pro. & D. 15; *Churton v. Fremmen*, Law R. 2 Eq. 634.

3 *In re Cathedral Church etc.* 8 L. T. N. S. 861.

4 *Byerley v. Windus*, 5 Barn. & C. 1; 7 Dowl. & R. 564.

5 *In re Cathedral Church etc.* 8 L. T. N. S. 861.

6 *Reynolds v. Monkton*, 2 Moody & R. 384. Compare *Jones v. Ellis*, 2 Younge & J. 265.

7 *Mant v. Collins*, 10 Jur. 390.

8 *Abernethy v. Church of Puritans*, 3 Daly, 1; *St. Paul's Church v. Ford*, 34 Barb. 16; *Sohler v. Trinity Church*, 109 Mass. 1; *Perrin v. Grauger*, 33 Vt. 101; *Union Meeting House v. Rowell*, 66 Me. 400. Pews are considered personal property in Pennsylvania: *Church v. Wells*, 24 Pa. St. 249. That, as between heir and executor, a pew is realty: see *Succession of Gamble*, 23 La. An. 9. Compare *Bates v. Sparrell*, 10 Mass. 323; *St. Paul's Church v. Ford*, 34 Barb. 16. The interest in a pew is separate from the fee, and may be leased and held distinct from the fee: *Woodworth v. Payne*, 74 N. Y. 196; 30 Am. R. 298.

9 *Daniel v. Wood*, 1 Pick. 102; *Union Meeting House v. Rowell*, 66 Me. 400; *First Baptist Soc. v. Grant*, 69 Id. 245; *White v. M. E. Church*,

3 Lans. 477; and see *Greenway v. Hockin*, Law R. 5 Com. P. 235; *Hinde v. Charlton*, Law R. 2 Com. P. 104.

10 *Voorhees v. Presby. Church*, 8 Barb. 135; *Van Houten v. First Ref. Dutch Church*, 17 N. J. Eq. 126; *Solomon v. Cong. B'nai Jeshurun*, 49 How. Pr. 263; *Sohler v. Trinity Church*, 109 Mass. 1.

11 *Trustees v. Bigelow*, 16 Wend. 28; *Vielle v. Osgood*, 8 Barb. 130.

12 *Frelligh v. Platt*, 5 Cowen, 484.

13 *Shaw v. Beveridge*, 3 Hill, 26; *Stocks v. Booth*, 1 Term Rep. 428; *Woodworth v. Payne*, 14 N. Y. 196; 30 Am. R. 298.

14 *O'Hear v. De Goesbriand*, 33 Vt. 593.

15 *Howe v. Stevens*, 47 Vt. 262.

16 *Montgomery v. Johnson*, 9 How. Pr. 232. Bare possession of a pew, without title, justifies the occupier in defending the possession by force against the entry of a person having no title: *Brett v. Mularkey*, 7 I. R. C. L. 120.

§ 280 Burial-lots.—Provision for the proper and decent burial of the dead is a public necessity and duty;¹ and the legislature may lawfully provide for the compulsory taking of land by rural cemetery corporations.² And a court of equity may restrain invasion and quiet the possession of grounds appropriated by a church organization to purposes of a cemetery.³ The purchaser of a lot in a cemetery for "burial purposes" does not take any title to the soil.⁴ The grant, though in terms conveying the fee, is an easement merely, which will be protected from disturbance, but the owner cannot prevent a sale of the property.⁵ Vaults, monuments, etc., constructed or erected upon a lot in a cemetery, are the personal property of the holder of the lot, and he may remove them at his pleasure.⁶ And an action may be maintained against one for taking up a tombstone in a churchyard or for defacing the inscriptions thereon, by the party by whom it was erected.⁷ But a dead body is not the subject of property, strictly speaking,⁸ and the only action that can be brought for disinterring it, is trespass *quare clausum*, which any person in the actual possession of the land may maintain against a wrong-doer.⁹ Indignities offered to human remains, in improperly and indecently disinterring them, are the ground of an indictment;¹⁰ and if any one in taking up a dead body steals the shroud or other apparel, it will be a criminal offense.¹¹ But the legislature may regulate

the interment of the dead, so as to prevent injury to the health of the community;¹² and an act of the legislature authorizing the vacation of a graveyard, and the removal of the bodies therefrom, may be sustained as a proper exercise of the police power of the state.¹³ A dedication of land for a burying-ground is valid,¹⁴ and a trust to build and keep in repair tombs, vaults, and burying-grounds of the donor is valid, and will be carried into effect.¹⁵ The managers of a cemetery may be compelled by mandamus to permit the burial of persons entitled to sepulture therein.¹⁶

1 *Pierce v. Swan Point Cemetery*, 10 R. I. 227; 14 Am. R. 667; *Matter of Deansville Cemetery Assoc.* 5 Hun. 482. Every person dying in England, and not within certain ecclesiastical prohibitions, is entitled to Christian burial: *Reg. v. Stewart*, 12 Ad. & E. 773; 4 Perry & D. 349. But the mode of burial is of ecclesiastical cognizance: *Rex v. Coleridge*, 1 Chit. 488; 2 Barn. & Adol. 806. No burial-fee is due at common law, but it may be due by custom in any particular parish: *Andrews v. Cawthorne, Willes*, 536.

2 *Matter of Deansville Cemetery Assoc.* 5 Hun. 482; *Edgecumbe v. Burlington*, 46 Vt. 218; *Balch v. County Comm'rs*, 103 Mass. 106; *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 191.

3 *Trustees etc. v. Walsh*, 57 Ill. 363; 11 Am. R. 21; *Pierce v. Swan Point Cemetery*, 10 R. I. 227; 14 Am. R. 667; and see *Moreland v. Richardson*, 24 Beav. 33. In Kentucky, a cemetery or graveyard cannot be subjected to sale to pay for improvements on streets adjacent thereto: *Louisville v. Nevin*, 10 Bush, 549.

4 *Kincaid's Appeal*, 66 Pa. St. 411; 5 Am. R. 377; and see *Sohler v. Trinity Church*, 109 Mass. 1; *Burke v. Wall*, 29 La. An. 38; 29 Am. R. 316; *Buffalo City Cemetery v. Buffalo*, 46 N. Y. 503; *Partridge v. First etc. Church*, 39 Md. 631.

5 *Windt v. German Ref. Church*, 4 Sand. Ch. 471; *Ex parte Ref. Presby. Church*, 7 How. Pr. 476; *Richards v. Dutch Church*, 11 Abb. Pr. 30; 32 Barb. 42. Compare *Rosseau v. City of Troy*, 49 How. Pr. 492; *Matter of Brick Presby. Ch.* 3 Edw. Ch. 155. A mortgage of a burial-lot is not void as against public policy: *Lautz v. Buckingham*, 11 Abb. Pr. N. S. 64; 4 Lans. 434. But compare *Thompson v. Hickey*, 8 Abb. N. C. 159.

6 *Partridge v. First etc. Church*, 39 Md. 631. Compare *Ashby v. Harris*, Law R. 3 Com. P. 523; *Keet v. Smith*, Law R. 1 Gro. & D. 73.

7 *Spooner v. Brewster*, 2 Car. & P. 34; 3 Bing. 136; 10 Moore, 494. See *Hitchcock v. Walter*, 6 Dowl. P. C. 457; *Sabine v. Harkness*, 4 N. H. 415.

8 See *Foster v. Dodd*, 8 Best & Smith, 842; *Pierce v. Swan Point Cemetery*, 10 R. I. 227; 14 Am. R. 667.

9 *Meagher v. Driscoll*, 99 Mass. 281. See *Brewer v. Dew*, 14 Mees. & W. 625.

10 *Foster v. Dodd*, 8 Best & Smith, 842; *Reg. v. Sharpe*, 7 Cox C. C. 214.

11 *Rex v. Lynn*, 2 Term Rep. 733; *Haynes' Case*, 12 Co. 113.

12 *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 191.

13 Kincaid's Appeal, 66 Pa. St. 411; 5 Am. R. 377.

14 Hunter v. Trustees etc. 6 Hill, 407; Hurlinan v. Honcomp, 5 Ohio St. 237.

15 Floyd v. Lloyd, 2 Sim. N. S. 255; Swasey v. American etc. 57 Me. 327. Compare Hoare v. Osborne, Law R. 1 Eq. 532.

16 Cemetery Assoc. v. Commonw. 81 Pa. St. 235; 22 Am. R. 743.

§ 281. Trustees and other officers.—The rules, or even a well-established usage, of a religious society, governing the election of trustees and other officers, must be substantially followed, in order to give validity to the election.¹ But an election of trustees is good, notwithstanding non-compliance with the requirements of the statute in respect to notice, provided the election was fairly conducted, and all in fact had notice.² The trustees of a religious society are its managing agents, and may act for it as fully as the directors or agents of other corporate bodies.³ They are presumably authorized to engage services in taking care of the church building and grounds;⁴ and they may sue to recover possession of the church building, although it is occupied by a majority of the corporators.⁵ They have power to regulate and order the renting of pews,⁶ and to act in the preservation of order and the removal of disturbers from meetings of the church.⁷ But in order to bind the corporate body, the trustees must meet as a board, so that they may hear each other's views, deliberate, and decide.⁸ Where the trustees, acting in good faith and with reasonable prudence, make expenditures and disbursements for the erection of a house of worship, they should be allowed therefor, although such expenditures exceed the amount of the trust.⁹ If trustees are required to be members of the society, and withdraw therefrom after election, they thereby cease to be trustees.¹⁰ But if trustees are not required to be communing members, the exclusion of a person from communing membership, though it be rightful, does not disqualify him from holding office as trustee.¹¹ A treasurer of a religious society is not justified in giving negotiable instruments binding

the society, without being authorized so to do by a special vote.¹² A member of a congregational church, elected its treasurer, who invests the funds of the church in his individual name, holds them as a trustee for the church, and as such is subject to the jurisdiction of a court of equity.¹³ In general, the regularly constituted officers of a church society, acting in good faith, will be protected by law.¹⁴ In England, church wardens and overseers are not a complete body corporate, but are only empowered to accept, take, and hold in the nature of a body corporate.¹⁵ Church wardens are, however, a corporation for the purpose of the custody of the ornaments of the church;¹⁶ and they have a right of access to the church at proper seasons, but are not entitled to the custody of the keys of the church.¹⁷ If one church warden orders repairs to the church, without the knowledge of the other church wardens, he is liable individually.¹⁸ If there is more than one church warden, they must join as co-plaintiffs, in order to maintain a suit.¹⁹

1 First African etc. Church v. Hillery, 51 Cal. 155; McIlvain v. Christ Church, 8 Phila. 507; Nelson v. Benson, 69 Ill. 27; Miller v. Eschbach, 43 Md. 1; and see People v. Farrington, 22 How. Pr. 294.

2 People v. Peck, 11 Wend. 604; and see People v. Runkel, 9 Johns. 147; People v. Moore, 73 Ill. 132.

3 Matter of St. Ann's Church, 23 How. Pr. 285; 14 Abb. Pr. 424; Kullinski v. Dambrowski, 29 Wis. 109; ante, § 270.

4 St. Patrick's etc. Church v. Gavalon, 82 Ill. 170; 25 Am. R. 305.

5 First M. E. Church v. Filkins, 3 Thomp. & C. 279; and see Beach v. Allen, 7 Hun. 441; Voorhees v. Presby. Church, 17 Barb. 103; Matter of Second Baptist Soc. 20 How. Pr. 324. Compare North Baptist Church v. Parker, 36 Barb. 171; Morgan v. Rose, 23 N. J. Eq. 583.

6 Solomon v. Cong. B'nai Jeshurun, 49 How. Pr. 263. See § 279, ante.

7 Beckett v. Lawrence, 7 Abb. Pr. N. S. 403; McLain v. Matlock, 7 Ind. 525; Wall v. Lee, 34 N. Y. 141.

8 Constant v. Rector etc. 4 Daly, 305; and see § 276, ante.

9 Bradbury v. Birchmore, 117 Mass. 569. Compare Devoss v. Gray, 22 Ohio St. 153; Winship v. Smith, 61 Me. 118; Kloop v. Moore, 6 Kan. 27.

10 Baptist Church v. Noe, 12 How. Pr. 497; Connitt v. Ref. Protestant etc. Church, 4 Lans. 339, 357. Compare Doremus v. Dutch Ref. Church, 2 Green Ch. 332.

11 Bouldin v. Alexander, 15 Wall. 131.

12 Packard v. Universalist Soc. 10 Met. 427.

13 Weid v. May, 9 Cush 181; and see Brunnenmeyer v. Buhre, 32 Ill. 183.

14 *Lucas v. Case*, 9 Bush, 297; and see *Commonw. v. Dougherty*, 107 Mass. 243.

15 *Smith v. Adkins*, 8 Mees. & W. 236.

16 *Liddell v. Beal*, 14 Moore P. C. C. 1; and see *Jackson v. Adams*, 2 Bing. N. C. 402; 2 Scott, 589.

17 *Ritchings v. Cordingley*, Law R. 3 Ex. 113.

18 *Northwalte v. Bennett*, 2 Car. & M. 316; and see *Brook v. Guest*, 3 Bing. 481.

19 *Fry v. Treasure*, 2 Moore P. C. C. (N. S.) 539.

§ 282. **Pastor or priest.**—In England, the parson as such has a freehold estate in the glebe, the tithes, and other dues of the parish.¹ But in this country, the property of the church, its revenues, its glebe, its parsonage, if it have any, its church edifice, and the like, belong to the corporation;² and the clergyman has no rights or estate in any of them, other than such as are conferred by express contract,³ except, perhaps, the control and possession of the church edifice, or the right, in the nature of an easement, to enter therein on all occasions set apart in the parish for divine service.⁴ The congregation, in the manner indicated by the law of the land, and in the case of Episcopal churches by their vestry,⁵ call a clergyman to exercise his functions in their parish, and fix his compensation;⁶ and an injunction will lie, at the suit of the trustees of a religious society, to restrain a clergyman not chosen according to the usages of such society from using its building for the purpose of conducting religious services.⁷ But the trustees may be compelled by *mandamus* to admit a minister of the Methodist Episcopal church appointed by the bishop.⁸ A contract to pay an annual salary to the pastor of a church, so long as he should continue to officiate as such pastor, can only be dissolved by mutual consent.⁹ If the salary of a minister is not paid, he may recover by action against the corporation;¹⁰ and in order to support the action, he need not show that the trustees have acted as a corporation in engaging his services.¹¹ A call to a minister from a Presbyterian congregation, in the words prescribed by the

discipline of the church, signed by three elders and a trustee, is regarded as the act of the congregation, and binds it to pay the minister's salary.¹²

1 See *Bulwer v. Bulwer*, 2 Barn. & Adol. 470; *Marlborough v. St. John*, 5 De Gex & S. 174; *Ex parte Gamston*, Law R. 1 Ch. Div. 47; *Griffin v. Dighton*, 5 Best & Smith, 940; *Richings v. Cordingley*, 19 L. T. N. S. 26; *Harrison v. Forbes*, 6 Jur. N. S. 1353; *Town of Pawlet v. Clark*, 9 Cranch, 392.

2 See *People v. Fulton*, 11 N. Y. 94; *Wyatt v. Benson*, 23 Barb. 271; 4 Abb. Pr. 182; *Sohler v. Trinity Church*, 109 Mass. 1; § 275, *ante*.

3 *Youngs v. Ransom*, 31 Barb. 49.

4 *Lynd v. Menzies*, 33 N. J. L. 162.

5 *Youngs v. Ransom*, 31 Barb. 49; *Vestry etc. v. Mathews*, 4 Desaus. Eq. 578.

6 See *German Ref. etc. Church v. Busche*, 5 Sand. 666; *Gridley v. Clark*, 2 Pick. 403; *Bisbee v. Evans*, 4 Me. 375; *Johnson v. Trinity Church*, 11 Allen, 123; *Smith v. Nelson*, 18 Vt. 511; *Petty v. Tooker*, 21 N. Y. 267.

7 *First Cong. Church v. Stewart*, 43 Ill. 81. But compare *Lutheran Church v. Gristgau*, 34 Wis. 323.

8 *People v. Steele*, 2 Barb. 397.

9 *First Religious Soc. v. Stone*, 7 Johns. 112. See also *Sheldon v. Cong. Parish*, 24 Pick. 231.

10 *Ebaugh v. German Ref. Church*, 3 Smith, E. D. 60; *Landers v. Frank St. Church*, 15 Hun, 340; *Myers v. Baptist Society*, 38 Vt. 614; *Thompson v. Catholic Cong. Soc.* 5 Pick. 463; *Jones v. Mt. Zion Cong.* 30 La. An. (part 1) 711. A levy made on the church communion service, to satisfy a judgment obtained by a pastor against the trustees for his salary, was held to be invalid: *Lord v. Hardie*, 62 No. Car. 241; 23 Am. R. 683.

11 *Miller v. Baptist Church*, 1 Har. (Del.) 251. See *Vanvlieden v. Welles*, 6 Johns. 85.

12 *Paddock v. Brown*, 6 Hill, 530.

§ 283. **Expulsion of members.**—Formerly, in England, the excommunication of a church member was attended with serious temporal inconveniences and civil disabilities.¹ But in this age, and especially in this country, excommunication is a measure of religious censure only, and is incapable of impairing or affecting a man's civil rights.² And a member of a religious society owning property in common, who has been wrongfully expelled therefrom,³ may sue in a court of equity to compel an accounting and payment to him of his share of the assets.⁴ And the civil courts may inquire whether the expulsion of a member was the act of the church, or of persons who were not the church, and who, consequently,

had no authority to excommunicate by any proceedings.⁵

1 See 3 Blackst. Com. 101; *Barnabas v. Traunter*, 1 Vin. Abr. 396.

2 *Stern v. Congregation etc.* 2 Daly, 415; *Fitzgerald v. Robinson*, 112 Mass. 371; *Bouldin v. Alexander*, 15 Wall. 131.

3 See *Lemix v. Harmony Soc.* 3 Wall. Jr. 87.

4 *Nachtrieb v. Harmony Settlement*, 3 Wall. Jr. 66.

5 *Bouldin v. Alexander*, 15 Wall. 131; and see *Grosvenor v. United Soc. etc.* 118 Mass. 78.

§ 284. **Judicial control and review.**—Civil courts will interfere with churches or religious societies when rights of property or civil rights are involved,¹ and will give relief to the parties aggrieved.² But in all other cases, the spiritual court is the exclusive judge of its own jurisdiction;³ and if its decisions are not found to contravene public policy or the general law of the state, they should be accorded the full force and effect which the constitution, rules, and course of discipline of the religious body involved ascribe to them.⁴ If a member is convicted of a moral delinquency, and is expelled by a decree of the legally constituted church judicatory,⁵ the courts have no control in the matter, and a mandamus will not lie to reinstate the expelled member.⁶ But if he has been wrongfully deprived of the right to exercise an office or franchise, or to hold or enjoy rights of property, he is entitled to his remedy against the persons guilty of the wrong.⁷

1 *Grimes v. Harmon*, 35 Ind. 198; *Chase v. Cheney*, 58 Ill. 509; 11 Am. R. 95; *Batterson v. Thompson*, 3 Phila. 251.

2 *Watson v. Avery*, 2 Bush, 332; and see § 283, *ante*.

3 *Shannon v. Frost*, 3 Mon. B. 258; *German Ref. Church v. Seibert*, 3 Pa. St. 291; *Chase v. Cheney*, 58 Ill. 509; 11 Am. R. 95.

4 *Harrison v. Hoyle*, 24 Ohio St. 254; and see § 278, *ante*.

5 See § 283, *ante*.

6 *State v. Hebrew Cong.* 30 La. An. 205; 33 Am. R. 217; *People v. German etc. Church*, 3 Laus. 434; 53 N. Y. 163.

7 *People v. German etc. Church*, 53 N. Y. 103; and see § 283, *ante*.

CHAPTER XXI.

MUNICIPAL CORPORATIONS.

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§ 285. Legislative control over.—Municipal corporations are created by the legislature, either by special charter or under general acts of incorporation;¹ and it is a general rule, that the legislature has supreme power over them, unless constitutionally restrained.² The laws which establish and regulate such corporations may be repealed or altered at the will of the legislature,³ except so far as the repeal or change may affect the rights of third persons acquired under them.⁴ The legislature has undoubted power to prescribe and to enlarge, from time to time, the territorial limits of municipal corporations;⁵ so it has power to provide as to the mode and extent of taxation for their support, and how their debts shall be paid;⁶ and it may validate and confirm acts and contracts of the corporation which would otherwise be invalid;⁷ and may appropriate the moneys of the corporation in payment of claims, ascertained by it to be equitably due to individuals, though such claims cannot be judicially enforced.⁸ So the legislature may authorize a railway company to occupy the streets in a city, without the consent of the city;⁹ so it has power to create a police district or a board of police commissioners in or for a city;¹⁰ so it may empower a city council to determine what property is benefited by a local improvement, and should therefore be assessed towards its cost;¹¹ so it may confer on the municipal authorities a power which they may exercise or not, to make engagements for or in aid of works of public use or benefit;¹² so it has full power to abolish the offices in a city which were not constitutionally created.¹³ And in general, as it respects the powers and rights possessed by a municipal corporation, in its public character as the agent of the state, the control of the legislature is complete;¹⁴ but it is otherwise in respect to powers and rights conferred upon the corporation in its private character as agent of the corporators.¹⁵ Among the latter is the right to acquire, hold, and dispose of property, to sue and be sued, etc.,¹⁶ as to which the legislature has no right to

control the action of the corporation by compulsory legislation.¹⁷ And the legislature cannot authorize a municipal corporation to issue its obligations in aid of a work for private use or benefit.¹⁸

1 See *Tierny v. Dodge*, 9 Minn. 171; *Virginia City v. Mining Co.* 3 Nev. 86; *City of St. Louis v. Shields*, 62 Mo. 247; *Thomas v. Ashland*, 12 Ohio St. 121; *McPherson v. Foster*, 43 Iowa, 48; 23 Am. R. 215.

2 *Philadelphia v. Fox*, 64 Pa. St. 169; *Groff v. Mayor etc.* 44 Md. 67; *Martin v. Dix*, 52 Miss. 53; *Barnes v. District of Columbia*, 91 U. S. 540; *Fye v. Paterson*, 45 Tex. 312; and see § 7, *ante*.

3 *Police Jury v. Shreveport*, 5 La. An. 661; *New Orleans v. Hoyle*, 23 Id. 740.

4 *Lansing v. County Treasurer*, 1 Dill. 522; *Rader v. Road District*, 26 N. J. L. 273; *Commissioners v. Armstrong*, 45 N. Y. 234; 6 Am. R. 70; *Broughton v. Pensacola*, 93 U. S. 266; *Olney v. Harney*, 50 Ill. 453.

5 *McCallie v. Chattanooga*, 3 Head, 317; *Martin v. Dix*, 52 Miss. 53; *St. Louis v. Allen*, 13 Mo. 400; *Wade v. Richmond*, 18 Gratt. 53; *Giboney v. Cape Girardeau County*, 58 Mo. 141; *Stils v. Indianapolis*, 55 Ind. 515; *Stoner v. Flournoy*, 23 La. An. 850.

6 *Vance v. Little Rock*, 30 Ark. 435. See also *Love v. Schenck*, 12 Ired. 304; *Gutzweiler v. People*, 14 Ill. 142; *Richmond v. Richmond etc.* R. R. Co. 21 Gratt. 604.

7 *State v. Town of Guttenberg*, 38 N. J. L. 419; *Brown v. Mayor etc.* 63 N. Y. 239; *Blasell v. Jeffersonville*, 24 How. 287; *Achison v. Butcher*, 3 Kan. 104; *Bridgeport v. Railroad Co.* 15 Conn. 475; *Winn v. Macon*, 21 Ga. 275.

8 *Creighton v. San Francisco*, 42 Cal. 446; *Town of Guildford v. Supervisors etc.* 13 N. Y. 143; *New Orleans v. Clark*, 95 U. S. 644.

9 *Clinton v. Railroad Co.* 24 Iowa, 455; *Darlington v. Mayor etc.* 31 N. Y. 164; *Jersey City v. Jersey City etc.* R. R. Co. 20 N. J. Eq. 360.

10 *People v. Draper*, 15 N. Y. 532; *Baltimore v. Board of Police*, 15 Md. 376; *Police Comm'rs v. Louisville*, 3 Bush, 597; *State v. Covington*, 29 Ohio St. 102; *Gulley v. Guichard*, 27 La. An. 396.

11 *Carpenter v. St. Paul*, 23 Minn. 232. Compare *Baltimore v. Horn*, 26 Md. 194; *Johnson v. Milwaukee*, 40 Wis. 315.

12 *Att.-Gen. v. Eau Claire*, 37 Wis. 400; *Muscatine v. Railroad Co.* 1 Dill. 536; *State v. Linn County*, 44 Mo. 504; *Gilman v. Sheboygan*, 2 Black, 510. Compare *Hanson v. Vernon*, 27 Iowa, 28; *People v. Mayor etc.* 51 Ill. 17; *Carter v. Bridge Proprietors*, 104 Mass. 236; *Philadelphia v. Field*, 58 Pa. : 2. 320.

13 *State v. Hundhausen*, 26 Wis. 432; *Kendall v. Canton*, 53 Miss. 526.

14 See *Bailey v. Mayor etc.* 3 Hill, 531; *Park Commissioners v. Detroit*, 28 Mich. 228; *Richmond v. Long*, 17 Gratt. 375; *New Orleans etc.* R. R. Co. v. *New Orleans*, 26 La. An. 478.

15 *Small v. Danville*, 51 Me. 359; *Oliver v. Worcester*, 102 Mass. 489; *Gas Co. v. San Francisco*, 9 Cal. 453; *People v. Hurlburt*, 24 Mich. 44; *Jones v. New Haven*, 34 Conn. 1; *Commissioners v. Duckett*, 20 Md. 468. But compare *Darlington v. Mayor etc.* 31 N. Y. 164.

16 *New Orleans etc. R. R. Co. v. New Orleans*, 26 La. An. 478; *Touchar v. Touchard*, 5 Cal. 306.

17 *Park Comm'rs v. Detroit*, 28 Mich. 228.

18 *People v. Batchellor*, 53 N. Y. 128; *Weismer v. Village of Douglas*, 64 Id. 91; *Att.-Gen. v. Eau Claire*, 37 Wis. 400.

§ 286. Charter or act of incorporation.—A municipal corporation is absolutely created by the act of incorporation itself, and acceptance of the act by the people is not necessary.¹ A charter of a city may, however, be granted, subject to the condition that the people of the place affected give consent.² A legislative grant of authority to a city by its generally received though not its corporate name was held to be good.³ A constitutional power to create "corporations for municipal purposes," means municipalities or subdivisions of the state erected for the exercise of some of the functions of government, local or general.⁴ A change in the charter of a municipal corporation, or the substitution of a new charter in place of the old, will not be deemed to affect the identity of the corporation, or to relieve it from its previous liabilities, unless it be otherwise expressly so declared.⁵ Nor is its identity destroyed, or its right to hold property devised to it affected, by a change of its name, an enlargement of its area, or increase of the number of its corporators.⁶ Where part of the territory and inhabitants of a town is created a new town by the legislature, the new corporation takes none of the property of the original town, except as expressly provided in the act of separation.⁷ And a town not incorporated has no right to avail itself of privileges conferred by statute, upon incorporated towns only.⁸

1 *Berlin v. Gorham*, 34 N. H. 266; *Gorham v. Springfield*, 21 Me. 58; *Blessing v. Galveston*, 42 Tex. 641; and see § 24. *ante*.

2 *Stone v. Charlestown*, 114 Mass. 214; *City of Paterson v. Society etc.*, 4 Zab. 386; *Mayor etc. v. Finney*, 54 Ga. 317; *Mills v. Williams*, 11 Ired. 558.

3 *Pittsburg v. Craft*, 1 Pittsb. Rep. 158.

4 *State v. Leffingwell*, 54 Mo. 458; and see *Hamilton County v. Mighels*, 7 Ohio St. 109; *St. Louis v. Shield*, 62 Mo. 247. That the term "municipal corporations," used in any statute, will be taken in the strict constitutional sense, as not including towns; see *Eaton v. Manitowoc County*, 44 Wis. 489. That the word "town," in a constitutional inhibition of special laws regulating the internal affairs of towns and counties, includes cities; see *State v. Parsons*, 40 N. J. L. 1. Compare *Whitall v. Gloucester*, 40 id. 302.

5 *Broughton v. Pensacola*, 93 U. S. 266; and see *Rader v. Road District*, 36 N. J. L. 273; *State v. Mayor etc.* 24 Ala. 701.

6 Girard v. Philadelphia, 7 Wall. 1.

7 Windham v. Portland, 4 Mass. 384; Greenville v. Mason, 53 N. H. 515; North Yarmouth v. Skillings, 45 Me. 133.

8 McMenning v. Farrar, 46 Mo. 378.

§ 287. Powers in general.—Municipal corporations can exercise no powers except those expressly granted, or such as are necessarily implied from the express grant.¹ And they have no right to appropriate their revenues to obtain an increase of power by the employment of persons to appear before the legislature.² So, as a general rule, if the mode in which a power is to be exercised on any given subject is prescribed in the charter, that mode must be followed.³ The legislative powers of a municipal corporation cannot be vicariously exercised,⁴ or delegated to others.⁵ If the corporation exceeds its powers, even by acts done in the form of legislation, the courts of law may reverse or set aside such unauthorized legislation;⁶ but it is otherwise, as it respects legislative acts or the exercise of discretionary powers, within the authority of the corporation.⁷ The latter, however unwise or impolitic, are beyond the control of the courts.⁸ Powers clearly conferred are not to be defeated or impaired by a stringent construction of the charter;⁹ and especially is this so in respect to powers conferred for the preservation of the public health.¹⁰ Special laws conferring particular rights upon municipal corporations are not repealed by subsequent statutes, general in their character, unless the provisions of the two are clearly inconsistent.¹¹ A later law, expressly conferring a power, prevails over a prior act refusing the power.¹² Provisions in the charter inconsistent with amendments to the constitution subsequently adopted are void.¹³

1 Johnston v. Louisville, 11 Bush, 527; Wallace v. Jose, 29 Cal. 190; Leavenworth v. Norton, 1 Kan. 432; Alley v. Inhabitants etc. 53 Me. 446; Booth v. Town of Woodbury, 32 Conn. 118; Weith v. Wilmington, 68 No. Car. 24; Alton v. Aetna Ins. Co. 82 Ill. 45.

2 Henderson v. Covington, 14 Bush, 312. And compare Westbrook v. Deering, 63 Me. 231; Milot v. West Roxbury, 112 Mass. 1.

3 Zottman v. San Francisco, 20 Cal. 96; First Presby. Church v. Fort Wayne, 36 Ind. 338.

4 *Matthews v. Alexandria*, 68 Mo. 115.

5 *Oakland v. Carpentier*, 13 Cal. 540; *Smith v. Morse*, 21d. 524; *Lanenstein v. Fond Du Lac*, 28 Wis. 338; *Scofield v. City of Lansing*, 17 Mich. 437; *St. Louis v. Clemens*, 43 Mo. 395; *Ruggles v. Collier*, 45 id. 353.

6 *Bond v. Mayor etc.* 19 N. J. Eq. 376.

7 *Bond v. Mayor etc.* 19 N. J. Eq. 376. And compare *Motz v. Detroit*, 18 Mich. 496; *Mayor etc. v. Britton*, 12 Abb. Pr. 367, note; 21 How. Pr. 251.

8 *Bond v. Mayor etc.* 19 N. J. Eq. 376.

9 *Kyle v. Malin*, 8 Ind. 34; and see *Memphis v. Brown*, 11 Law Reg. (N. S.) 629; 6 West. Jur. 495.

10 *Gregory v. New York*, 40 N. Y. 273.

11 See *Louisville v. Kean*, 18 Mon. B. 9; *Bond v. Hiestand*, 20 La. An. 139; *State v. Morristown*, 33 N. J. L. 57; *Hankins v. Mayor etc.* 64 N. Y. 18. Compare *Burchard v. State*, 2 Oreg. 78; *Jersey City v. Jersey City etc.* R. E. Co. 29 N. J. Eq. 360; *Ottawa v. County of La Salle*, 12 Ill. 339.

12 *St. Louis v. Life Assoc.* 53 Mo. 466; and see *Brackett v. People*, 72 Ill. 593.

13 *Trustees etc. v. Taylor*, 30 N. J. Eq. 618.

§ 288. Powers as to property.—A municipal corporation may at common law, unless restrained by charter or some statute, purchase and hold all such real estate as may be necessary to the proper exercise of any power specifically conferred, or essential to those purposes of municipal government for which it was created.¹ And a grant of land for a specific purpose, as for a school, is not forfeited by the use of a portion of the land, not needed for the school, for other purposes.² A municipal corporation cannot, however, as a general rule, purchase and hold real estate beyond its territorial limits, unless the power to do so is conferred by the legislature.³ Bequests and devises directly to the corporation for its general purposes,⁴ or in trust for particular objects within the scope of its corporate duties,⁵ are good, in the absence of disabling or restraining statutes.⁶ So a municipal corporation may alienate its property, real and personal, of a private nature, when not restrained by charter or statute;⁷ but it is otherwise, as it respects property held by the corporation in general or special trust.⁸ Thus, the authorities of a municipal corporation hold the title to streets, public

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squares, commons, etc., in trust for the public use, and cannot dispose of them, except in the execution of that trust.⁹ A power to erect, repair, and regulate wharves in a city does not enable the city to sell its wharf property, whether acquired by dedication or condemnation;¹⁰ or even to make a lease of such property to private individuals for a fixed period not determinable at the will of the city.¹¹ The power to expend money for public purposes in municipal corporations is vested in the legislative and not in the executive authorities;¹² hence, the city councils, and not the heads of departments, are empowered to authorize public expenditures.¹³ And the judgment of the local government of such a corporation may, in general, be safely taken as *prima facie* evidence as to whether the object proposed is a legitimate "corporate purpose."¹⁴ The object for which a tax is imposed by the corporate authorities need not necessarily be within the corporate limits to make it a corporate purpose;¹⁵ if it be a matter of vital importance to the permanent interests of the corporation, although situated beyond the limits thereof, it is sufficient.¹⁶ It would be a city purpose to purchase a supply of water outside of the city, and convey it into the city, and for such a purpose a city debt could be created.¹⁷ So, lands for a park for the health and comfort of the inhabitants of a city could be purchased outside of the city limits.¹⁸ Money required by statute to be advanced from the city treasury for preliminary expenses of an extension of streets, is for a "municipal purpose."¹⁹ A provision in a village charter, that no "expenditure shall be made or incurred until the money or tax for that specific object shall have been voted or levied," should not be restricted to current expenses; but it extends to the case of a purchase by the village of a lot for cemetery purposes.²⁰

1 Ketchum v. City of Buffalo, 14 N. Y. 356; Peterson v. Mayor etc. 71 Id. 449; Paige v. Heintz, 40 Vt. 81; and see Richardson v. Boston, 24 How. 183; DeWitt v. San Francisco, 2 Cal. 289.

2 Castleton v. Langdon, 19 Vt. 210.

3 Riley v. Rochester, 9 N. Y. 64; Chambers v. St. Louis, 29 Mo. 543; Concord v. Boscawen, 17 N. H. 465.

4 *Chambers v. St. Louis*, 29 Mo. 543; *State v. Atkinson*, 24 Vt. 448; *French v. Quincy*, 3 Allen, 9; *Worcester v. Eaton*, 13 Mass. 371; *Coggeshall v. Pulton*, 7 Johns. Ch. 292.

5 *Girard v. Philadelphia*, 7 Wall. 1, 14; *Holland v. San Francisco*, 7 Cal. 361; *Perin v. Carey*, 24 How. 465; *Mayor etc. v. Elliott*, 3 Rawle, 170; *Webb v. Neal*, 5 Allen, 575; *Sargent v. Cornish*, 54 N. H.

6 See *Inhabitants etc. v. Cole*, 3 Pick. 232; *Town of Hamden v. Rice*, 24 Conn. 350. See §§ 52, 53, *ante*.

7 *Newark v. Elliott*, 5 Ohio St. 113; *Knox County v. McComb*, 19 Ohio St. 320; *Touchard v. Touchard*, 5 Cal. 306; *New Orleans etc. R. R. Co. v. New Orleans*, 26 La. An. 478; *Beach v. Haynes*, 12 Vt. 15; and see *Crook v. Corp. of Seaford*, Law R. 10 Eq. 678.

8 *Ransom v. Boal*, 29 Iowa, 68; *Augusta v. Perkins*, 3 Mon. B. 437; *Philadelphia v. Railroad Co.* 53 Pa. St. 253; *Supervisors v. Patterson*, 56 Ill. 111; *People v. City of Albany*, 4 Hun, 675.

9 *Giltner v. Trustees etc.* 7 Mon. B. 680; *Commonw. v. Rush*, 14 Pa. St. 186; *Reynolds v. Stark County*, 5 Ohio, 204; *Milbau v. Sharp*, 15 Barb. 193; 27 N. Y. 611; *Ransom v. Boal*, 29 Iowa, 68. See *Cheshire v. Adams etc. Reservoir Co.* 119 Mass. 356. *Brooklyn Park Commrs v. Armstrong*, 3 Lans. 429; 45 N. Y. 234.

10 Ill. etc. R. R. Co. v. St. Louis, 2 Dill. 70.

11 Ill. etc. R. R. Co. v. St. Louis, 2 Dill. 70.

12 *Philadelphia v. Flanigen*, 47 Pa. St. 21. Compare *Lauenstein v. Fond du Lac*, 28 Wis. 336; *State v. Haben*, 22 Id. 660.

13 *Philadelphia v. Flanigen*, 47 Pa. St. 21.

14 *McCallie v. Mayor etc.* 3 Head, 317.

15 *McCallie v. Mayor etc.* 3 Head, 317.

16 *McCallie v. Mayor etc.* 3 Head, 317; *People v. Kelly*, 5 Abb. N. C. 383; 76 N. Y. 475.

17 *People v. Kelly*, 5 Abb. N. C. 383, 447; 76 N. Y. 475; and see *Meyer v. Muscatine*, 1 Wall. 384, 391.

18 *People v. Kelly*, 5 Abb. N. C. 383; 76 N. Y. 475. Compare *Chambers v. St. Louis*, 29 Mo. 542; *Riley v. Rochester*, 9 N. Y. 64; *Oevericke v. Pittsburg*, 7 Am. Law Reg. 725.

19 *Sinton v. Ashbury*, 41 Cal. 525.

20 *Latham v. Richards*, 12 Hun, 360.

§ 289. *Contracts by and with.*—A municipal corporation, unless in some way restrained by charter, has the same general powers with other corporations to make contracts in furtherance of the corporate objects.¹ In the ordinary course of its government, it may make promissory notes, bonds, guaranties, and all other agreements necessary for the proper financial management of its affairs.² Under a general authority to make contracts necessary for its welfare, it may contract for roads and bridges;³ for water-works;⁴ for the grading of streets;⁵ for the repair of engine-houses;⁶ or for the erection of a

"breakwater" for the protection of the city streets against the waters of an adjoining lake.⁷ If the mode of contracting is prescribed, that mode must be pursued;⁸ but if no mode is prescribed, valid contracts within the compass of the corporate powers may be made, just as natural persons may make like contracts.⁹ The contract need not be under seal, or in writing, unless expressly so required.¹⁰ But where a statute, such as the statute of frauds, requires a writing "signed" by the parties, an ordinance, resolution, or vote accepting a proposal is not a compliance therewith, since it is not a signature.¹¹ A municipal corporation has no power to make a contract, the effect of which would be to limit or embarrass its legislative powers and duties.¹² And its officers or agents cannot bind it by a contract made in violation of law,¹³ or beyond the scope of its corporate powers,¹⁴ although the corporate seal is attached thereto.¹⁵ And persons dealing with the corporation must ascertain at their peril that the officers or agents representing it are acting within their powers.¹⁶ The incidental or implied power of municipal corporations to borrow money has been denied;¹⁷ and it was held, that a note given by such corporation, for an unauthorized loan, is incapable of being enforced, although the money borrowed has been expended for municipal purposes.¹⁸ The power to borrow money may, of course, be conferred in express language;¹⁹ and a power to borrow money for any public purpose, whenever in the opinion of the city council it shall be expedient to exercise it, is valid.²⁰ And in general, as it respects contracts made by municipal corporations in the exercise of powers intrusted to them in their municipal character, exclusively for public purposes, the courts have no power to review or control their acts, unless they transcend the limits of their delegated powers.²¹

1 *Douglas v. Virginia City*, 5 Nev. 147; *Goodrich v. Detroit*, 12 Mich. 279; *Albright v. Town Council*, 9 Rich. 399; *Williamsport v. Commonw.* 84 Pa. St. 487; *Batchman v. Mayor etc.* 3 Hurl. & N. 322.

2 *Galena v. Commonw.* 48 Ill. 423; *Memphis v. Brown*, 6 West. Jur. 495; *McIntosh v. Foster*, 43 Iowa, 45; 22 Am. R. 215.

- 8 *Royalton v. Turnp. Co.* 14 Vt. 311.
- 4 *Rome v. Cabot*, 28 Ga. 50; and see *Wells v. Atlanta*, 43 Id. 67; *Hall v. Houghton*, 8 Mich. 457; *McKnight v. New Orleans*, 24 La. An. 412.
- 5 *Sturtevant v. City of Alton*, 3 McLean, 303.
- 6 *Robinson v. St. Louis*, 28 Mo. 488.
- 7 *Miller v. Milwaukee*, 14 Wis. 642. A municipal corporation may offer rewards for the detection of offenders; *Borough of York v. Forscht*, 23 Pa. St. 391. And may legally indemnify an officer, acting in good faith, for a loss incurred in the discharge of his official duty: *State v. Hammonton*, 38 N. J. L. 430; 20 Am. R. 404; *Gregory v. Bridgeport*, 41 Conn. 76; 19 Am. R. 485.
- 8 *Trustees etc. v. Cherry*, 8 Ohio St. 564; *Terre Haute v. Lake*, 43 Ind. 490; *Bladen v. Philadelphia*, 60 Pa. St. 464; *Baltimore v. Reynolds*, 20 Md. 1; *Pimental v. San Francisco*, 21 Cal. 351.
- 9 *Burrill v. Boston*, 2 Cliff. 590; *City of Selma v. Mullen*, 46 Ala. 411. And see *Indianola v. Jones*, 29 Iowa, 232; *Booth v. Shreveport*, 29 La. An. 581; § 44, *ante*.
- 10 *Selma v. Mullen*, 46 Ala. 411; *Alton v. Mulledy*, 21 Ill. 76; *Wade v. Newbern*, 77 No. Car. 460.
- 11 *Wade v. Newbern*, 77 No. Car. 460. Compare *People v. San Francisco*, 27 Cal. 655; *Argus Co. v. Mayor etc.* 7 Lans. 264; 55 N. Y. 435; *Commonw. v. Marshall*, 69 Pa. St. 328; *Moore v. Mayor etc.* 4 Hun, 545.
- 12 *New York etc. R. R. Co. v. Mayor etc.* 1 Hilt. 562; *Louisville City R. R. Co. v. Louisville*, 8 Bush, 415; *Jackson v. Bowman*, 39 Miss. 671; *Thomas v. Richmond*, 12 Wall. 349; *Goszler v. Corp. of Georgetown*, 6 Wheat. 593; *Gale v. Kalamazoo*, 23 Mich. 344.
- 13 *Fox v. New Orleans*, 12 La. An. 154; and see *Chicago v. Rumpff*, 45 Ill. 90.
- 14 *Perry v. Superior City*, 23 Wis. 64; *Norton v. Mansfield*, 16 Mass. 48; *Frost v. Belmont*, 6 Allen, 152.
- 15 *Leavenworth v. Rankin*, 2 Kan. 357; *Wallace v. San José*, 29 Cal. 180; *Brauham v. San José*, 24 Id. 585; *Marsh v. Fulton County*, 10 Wall. 676; *State v. Kirkley*, 29 Md. 85. Compare *Brown v. Mayor etc.* 63 N. Y. 239.
- 16 *City Council v. Plank Road Co.* 31 Ala. 76; *Murphy v. Louisville*, 9 Bush, 189; *McDonald v. Mayor etc.* 68 N. Y. 23; *Baltimore v. Eschbach*, 14 Md. 276; *Schumm v. Seymour*, 24 N. J. Eq. 143; *Ramsey v. Western District Council*, 4 Up. Can. Q. B. 374.
- 17 *Hackettstown v. Swackhamer*, 37 N. J. L. 191; and see *Beaman v. Board of Police*, 42 Miss. 238; *Police Jury v. Britton*, 15 Wall. 566. That they have implied power to borrow money for objects expressly authorized by charter, for the execution of which money would be a necessary means; see *Mills v. Gleason*, 11 Wis. 479; *Stratton v. Allen*, 16 N. J. Eq. 229; *Ketchum v. City of Buffalo*, 14 N. Y. 356.
- 18 *Hackettstown v. Swackhamer*, 37 N. J. L. 191. Compare *City v. Lamson*, 9 Wall. 477.
- 19 *Gilman v. Sheboygan*, 2 Black. 510.
- 20 *Rogers v. Burlington*, 3 Wall. 654; *Larned v. Burlington*, 4 Id. 275; *Reinboth v. Pittsburg*, 41 Pa. St. 278; *Galena v. Corwith*, 48 Ill. 423.
- 21 *Rittenhouse v. Mayor etc.* 25 Md. 336; and see *De Voss v. Richmond*, 18 Gratt. 336; *Bond v. Mayor etc.* 19 N. J. Eq. 376; § 285, *ante*.

§ 290. Issue of negotiable paper by.—A power expressly conferred upon a municipal corporation "to borrow money" includes the power to issue its negotiable bonds,¹ or other securities, to the lender;² but it does not include the power to issue paper for circulation, in the similitude of bank-notes, in contravention of the statute law and public policy of the state.³ And municipal corporations have not implied power to issue notes, bills, or other securities of a commercial character which will be free from equitable defenses in the hands of innocent purchasers for value;⁴ nor have the officers of such corporations implied power to issue ordinary municipal warrants or orders which shall be free from equities in the hands of holders.⁵ In this respect, such warrants are different from authorized negotiable bonds or securities issued by municipal corporations.⁶

1 Mayor etc. v. Inman, 57 Ga. 370; Milner v. Pensacola, 2 Wood, 632; Vicksburg v. Lombard, 51 Miss. 111; and see Comm'rs etc. v. Atlantic etc. R. R. Co. 77 No. Car. 289; Tucker v. Raleigh, 75 id. 267.

2 Reinboth v. Pittsburg, 41 Pa. St. 278; Seybert v. Pittsburg, 1 Wall. 272; Rogers v. Burlington, 3 id. 654; Galena v. Corwith, 48 Ill. 423.

3 Thomas v. Richmond, 12 Wall. 349; Dively v. Cedar Falls, 21 Iowa, 865; Evans v. Richmond, Chase Dec. 551.

4 Mayor v. Ray, 19 Wall. 468; Williamsport v. Commonw. 84 Pa. St. 487; Hackettstown v. Swackhamer, 37 N. J. L. 191; Chisholm v. City of Montgomery, 2 Wood, 584. Compare Ketchum v. City of Buffalo, 14 N. Y. 356; Bank of Rome v. Village of Rome, 18 id. 38; Goodman v. Comm'rs, 11 Minn. 31; Clarke v. School District, 3 R. I. 199; Clark v. Des Moines, 19 Iowa, 199. A city has not power to execute a guaranty of a promissory note, as incidental to a power conferred by charter to sell negotiable paper, and such a guaranty is void, even in the hands of an innocent assignee for value: Carter v. Dubuque, 35 Iowa, 416.

5 Inhabitants etc. v. Weir, 9 Ind. 224; Smith v. Cheshire, 13 Gray, 318; People v. County, 11 Cal. 170; People v. Gray, 23 id. 125; Emery v. Mariaville, 56 Me. 315; Comm'rs v. Keller, 6 Kan. 510; O'Donnell v. City, 2 Brewst. 481; 7 Phila. 234; Miller v. Thompson, 3 Man. & G. 576.

6 School District v. Lombard, 2 Dill. 493. See Danielly v. Cabaniss, 52 Ga. 211; Denning v. Houlton, 64 Me. 254; McPherson v. Foster, 43 Iowa, 48.

§ 291. Subscriptions in aid of public works.—Municipal corporations cannot, unless expressly authorized by their charters or other legislative acts, subscribe towards or pledge the corporate credit in aid of public works.¹ But it is a well-settled principle that, unless re-

strained by the organic law, it is competent for the legislature to confer such authority upon municipal bodies,² and enable them to issue their bonds in aid of public works, and to impose a tax for the payment of such bonds.³ But the legislature has not power to authorize municipal bodies to bond themselves in aid of enterprises not chartered for some public use.⁴ The true test in such cases is, whether the purpose to be effected is public or private:⁵ if the former, a mandatory statute is valid; if the latter, void.⁶ Railroads are clearly a public use, in aid of which the municipal body benefited may be authorized by the legislature to lend its credit or issue bonds;⁷ and the constitutionality of municipal railway-aid bonds is fully sustained by the courts.⁸ Public parks are likewise a public use;⁹ and authority to municipalities to issue bonds in aid of works of internal improvement was held to include mills, regulated as to their management by a general statute.¹⁰ But the power of municipal taxation cannot be employed in aid of private manufacturing companies.¹¹ To the extent that the legislature can constitutionally authorize municipal bonds, bonds which have been issued without sufficient statutory authority in their origin may be cured or sustained on the principle of ratification by subsequent legislation.¹² So a condition or prohibition that a subscription shall not be made unless the consent of a majority of the legal voters of the corporation consent, is satisfied by an affirmative vote of a majority of those who vote at the election.¹³ A majority of the legal voters, voting at an election, is sufficient to authorize a subscription, although those voting on both sides were together but a minority of all the legal voters of the corporation.¹⁴ If the power to issue bonds in aid of a public enterprise does not exist, such bonds are void, even in the hands of a *bona fide* holder for value.¹⁵ And authority to a municipal corporation to subscribe for stock in railroads, and to issue bonds in payment, does not include authority to contribute to a railroad by indorsing its bonds.¹⁶

- 1 *Chisholm v. City of Montgomery*, 2 Wood, 564; *Railroad Company v. Mayor etc.* 22 Ark. 300; *Aurora v. West*, 22 Ind. 88.
- 2 *Sharpless v. Mayor etc.* 21 Pa. st. 147; *Leavenworth etc. R. R. Co. v. Comm'rs*, 18 Kan. 163; *Pine Grove Township v. Talcott*, 53 Mo. 686; *Davidson v. Ramsey Co.* 18 Minn. 482; *Harcourt v. Good*, 39 Tex. 455.
- 3 *Milner v. Pensacola*, 2 Wood, 632; *Township of Pine Grove v. Talcott*, 19 Wall. 686; *Queensbury v. Culver*, id. 83; *People v. White*, 54 Barb. 622. As opposed to the power: see *Railroad Co. v. Sparta*, 77 Ill. 606; *Hanson v. Vernon*, 27 Iowa, 28; *People v. Township Board*, 20 Mich. 432; *Rogan v. Watertown*, 30 Wis. 259; *People v. Mayor etc.* 51 Ill. 17.
- 4 *Allen v. Jay*, 60 Me. 124; *Bissell v. Kankakee*, 64 Ill. 249; *Lowell v. Boston*, 111 Mass. 454; *Cleveland Bank v. City of Iowa*, 9 Kan. 689; *Lewis v. Comm'rs*, 12 Id. 186.
- 5 *Dunkirk etc. R. R. Co. v. Batchellor*, 53 N. Y. 128.
- 6 *Dunkirk etc. R. R. Co. v. Batchellor*, 53 N. Y. 128.
- 7 *Lawson v. Railway Co.* 30 Wis. 597; *Perry v. Keene*, 56 N. H. 514; *Mitchell v. Burlington*, 4 Wall. 270; *People v. Henshaw*, 61 Barb. 409; *Strickland v. Railroad Co.* 27 Miss. 200; *Ohio v. Comm'rs*, 14 Ohio St. 569; *King v. Wilson*, 1 Dill. 555.
- 8 *People v. Mitchell*, 35 N. Y. 551; *Leavenworth County v. Miller*, 7 Kan. 479; *Gelpcke v. Dubuque*, 1 Wall. 175; *Butz v. Muscatine*, 9 Wall. 571; *Township of Pine Grove v. Talcott*, 19 Id. 666; *County of Cass v. Johnston*, 95 U. S. 360. But see *People v. Salem*, 20 Mich. 452; 4 Am. l. 400.
- 9 *People v. Brislin*, 80 Ill. 423.
- 10 *Township of Burlington v. Beasley*, 94 U. S. 310.
- 11 *Commercial Bank v. City of Iowa*, 2 Dill. 353; *Allen v. Jay*, 60 Me. 124; and see *Weismer v. Village of Douglas*, 64 N. Y. 91; *Att.-Gen. v. Eau Claire*, 37 Wis. 400; *Loan Assoc. v. Topeka*, 20 Wall. 655.
- 12 *Putnam v. New Albany*, 4 Biss. 365; *Beloit v. Morgan*, 7 Wall. 619; *Kuapp v. Grant*, 27 Wis. 147; *State v. Florida etc. R. R. Co.* 15 Fla. 690.
- 13 *County of Cass v. Johnston*, 95 U. S. 360. But see *contra*: *Harshman v. Bates Co.* 92 Id. 569.
- 14 *St. Joseph Township v. Rogers*, 16 Wall. 644.
- 15 *Clay v. Nicholas County Court*, 4 Bush, 154; *Harshman v. Bates County*, 3 Dill. 150; *Police Jury v. Britton*, 15 Wall. 598; *Wilson v. Shreveport*, 29 La. An. 673; *Oelrich v. Pittsburg*, 1 Pittsb. Rep. 522; *Williamson v. Keokuk*, 44 Iowa, 88.
- 16 *Blake v. Mayor etc.* 53 Ga. 173.

§ 292. **Ordinances.**—It is competent for the legislature to delegate to a municipal corporation the power to enact ordinances for the government of the place;¹ and if the organic law contains nothing restricting the exercise of the power to any particular part of the municipal body, it may be conferred upon any department thereof, as may appear to be most just and expedient in the judgment of the legislature.² A special grant of power to legislate by ordinance on enumerated subjects connected

with municipal affairs is construed as in addition to the power of making by-laws, which is incidental to the creation of a corporation.³ A power to pass ordinances and appoint officers to enforce them includes all necessary power to make such ordinances effectual;⁴ hence, municipal corporations have implied power to impose reasonable and proper fines upon those who violate their ordinances.⁵ But where the charter or act of incorporation prescribes the mode of enforcing ordinances, that mode must be followed.⁶ City ordinances, duly enacted, are binding upon all the inhabitants of the city,⁷ and operate throughout the actual boundaries of the city, even after they are enlarged.⁸ An ordinance must be intelligible;⁹ and to be good, it must be reasonable,¹⁰ and not oppressive,¹¹ nor be in restraint of trade,¹² or in contravention of common right.¹³ And a grant of power to pass ordinances is understood to be subject to the implied limitation that they shall not be contrary to the general laws of the state.¹⁴ If part of an ordinance is void, another essential and connected part of the same is also void.¹⁵ Ordinances have been held void for want of publication in the manner prescribed by the charter;¹⁶ and an ordinance not published in a newspaper properly appointed by a municipal corporation to be its official paper, was held to be void.¹⁷ An ordinance imposing a forfeiture, fine, or imprisonment, without giving the party an opportunity to be heard on reasonable notice before the penalty is inflicted, is invalid.¹⁸ And one who is affected by an ordinance is entitled to a hearing in the courts to determine the validity of the ordinance, even before any attempt had been made to enforce it.¹⁹ But authority may be conferred by charter upon a municipal legislative body to prohibit, by ordinances, practices which are against good morals or public decency;²⁰ and when such body determines as a fact, that a particular practice is against good morals, and prohibits it by ordinance, its decision is final, and the courts will not review it.²¹ And ordinances

enacted by a department of a city government, relating to some particular subject, are not rendered invalid by the fact that acts forbidden by the ordinances under a penalty are also punishable under the general laws of the state;²² but both laws cannot be enforced in a particular case, thus subjecting the party to a double penalty for the same offense.²³ The repeal of an ordinance pending a prosecution under it ends all proceedings founded thereon,²⁴ and operates to release the defendant.²⁵

1 *St. Paul v. Coulter*, 12 Minn. 41; *Stater v. Clark*, 8 Post. 176; *Triggally v. Memphis*, 6 Cold. 382; *Hills v. Decatur*, 22 Ga. 243; *Brieswick v. Mayor etc.* 51 Id. 639; *Horn v. People*, 26 Mich. 221. An ordinance prescribes a permanent rule of conduct or government: *Blanchard v. Bissell*, 11 Ohio St. 96. See also *St. Louis v. Bank*, 49 Mo. 574; *Heland v. Lowell*, 3 Allen, 407. And a resolution has ordinarily the same effect as an ordinance: See *Gas Co. v. San Francisco*, 6 Cal. 190; *Kepler v. Commonwealth*, 40 Pa. St. 124; *Sower v. Philadelphia*, 35 Pa. St. 231.

2 *Brazier v. Miller*, 10 Hun, 435; *People v. Special Sessions*, 71d. 214.

3 *Stater v. Morristown*, 33 N. J. L. 57. Compare *Williams v. Augusta*, 4 Ga. 509; *State v. Ferguson*, 33 N. H. 424; *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 305; and see tit. BY-LAWS.

4 *Reinhard v. New York*, 2 Daly, 243; and see *State v. Cleveland*, 3 R. I. 117; *Roddy v. Finnegan*, 43 Md. 490.

5 *Triggally v. Memphis*, 6 Cold. 382; *Fisher v. Harrisburg*, 3 Grant Cas. 291; *Ewbanks v. Ashley*, 36 Ill. 178.

6 *Williamson v. Commonwealth*, 4 Mon. B. 146; *Miles v. Chamberlain*, 17 Wis. 446; *Goldthwaite v. City Council*, 50 Ala. 486; *Helse v. Town Council*, 6 Mich. 404; *Hart v. Mayor etc.* 9 Wend. 571. See *State v. Threadgill*, 76 No. Car. 17; *Davenport v. Bird*, 34 Iowa, 524; *City of Brownville v. Cook*, 4 Neb. 101; *City of Huntington v. Pease*, 56 Ind. 305.

7 *Whitfield v. Longest*, 6 Fred. 268; *City Council v. Pepper*, 1 Rich. 364; *Jones v. Insurance Co.* 2 Daly, 307; *Reed v. People*, 1 Park. 481.

8 *St. Louis Gas Light Co. v. St. Louis*, 46 Mo. 121. But see *New Orleans v. Anderson*, 9 La. An. 323.

9 *State v. Plainfield*, 38 N. J. L. 95; *Merriam v. New Orleans*, 14 La. An. 318; *Burr v. Newcastle*, 49 Ind. 323. Effect must, however, be given to all ordinances, if possible: *Commonwealth v. Robertson*, 6 Cush. 438.

10 *State v. Mayor etc.* 37 N. J. L. 348; *Peoria v. Calhoun*, 29 Ill. 317; *Commonw. v. Wilkins*, 121 Mass. 356; *Corrigan v. Gage*, 68 Mo. 541.

11 *Mayor v. Winfield*, 8 Humph. 767; *Pieri v. Sheldsboro*, 42 Miss. 493; *St. Louis v. Weber*, 44 Mo. 547; and see *Gridley v. Bloomington*, 88 Ill. 554; 30 Am. R. 568.

12 *Commonw. v. Stodder*, 2 Cush. 562; *Barling v. West*, 29 Wis. 307. Compare *Croun v. People*, 10 N. Y. Week. Dig. 565.

13 *Clason v. Milwaukee*, 30 Wis. 316; *Willard v. Killingworth*, 8 Conn. 247; *Tugman v. Chicago*, 78 Ill. 405; *City of Shreveport v. Levy*, 26 La. An. 671; 21 Am. R. 553. Compare *Taylor v. Griswold*, 2 Green, 222.

14 *St. Louis v. Kalme*, 2 Mo. App. 66; *Canton v. Nist*, 9 Ohio St. 439; *Thomas v. Richmond*, 12 Wall. 349; *Petersfield v. Vickers*, 3 Cold. 205; *People v. Pratt*, 22 Hun, 300.

15 *State v. Mayor etc.* 38 N. J. L. 110. Compare *Shelton v. Mobile*, 30 Ala. 540.

16 See *Philadelphia v. Edwards*, 78 Pa. St. 62; *Olds v. Erie City*, 79 Id. 380; *State v. Mayor etc.* 38 N. J. L. 110; *Barnett v. Newark*, 28 Ill. 62; *Klais v. Pulford*, 36 Wis. 587. Compare *People v. San Francisco*, 27 Cal. 655; *Clark v. Janesville*, 10 Wis. 136; *Stevenson v. Bay City*, 26 Mich. 44; *Whall v. Macomb*, 76 Ill. 49.

17 *Matter of Astor*, 50 N. Y. 363; and see *Re Douglass*, 12 Abb. Pr. N. S. 161; 46 N. Y. 42. Compare *matter of Anderson*, 60 N. Y. 457; *Matter of Burke*, 62 Id. 224; *Moore v. Mayor etc.* 73 Id. 238; *Higley v. Bunce*, 10 Conn. 435; *Tisdale v. Minonk*, 46 Ill. 9; *Wasem v. Cincinnati*, 2 Cin. 84.

18 *Judson v. Reardon*, 16 Minn. 431; *Durst v. People*, 51 Ill. 286.

19 *State v. Paterson*, 34 N. J. L. 163; *State v. Jersey City*, 34 Id. 390.

20 See *Nolin v. Mayor etc.* 4 Yerg. 163; *McAllister v. Clark*, 33 Conn. 91; *Shaffer v. Mumma*, 17 Md. 331; *Ex parte Delaney*, 43 Cal. 478.

21 *Ex parte Delaney*, 43 Cal. 478.

22 *Polinsky v. People*, 11 Hun. 390; and see *Brownville v. Cook*, 4 Neb. 101; *Huddleson v. Ruffin*, 6 Ohio St. 604.

23 *Polinsky v. People*, 11 Hun. 390.

24 *Naylor v. Galesburg*, 56 Ill. 235.

25 *Kansas City v. Clark*, 68 Mo. 588.

§ 293. Regulation of streets, etc.—The legislature may, and usually does, confer upon municipal corporations full and paramount control over the streets and public ways within their limits.¹ The municipal authorities of cities and villages may regulate the use of the streets, etc.;² and they are the exclusive judges of the propriety and necessity of the widening or laying out of a street within the corporate limits.³ A general power to lay out and open streets in a city implies power to establish the grade of such streets;⁴ and also the power to determine the respective widths of the streets and sidewalks.⁵ And power to grade streets, etc., includes power to make contracts relating to the same, with respect to the work to be done and compensation to be paid.⁶ The corporate authorities of a city hold the streets, whether they own the fee or have acquired an easement only, in trust for the public, and for purposes of general travel.⁷ Whatever interferes unreasonably and unnecessarily with the public right of free and unobstructed travel over the streets is a nuisance, which the authorities may prohibit by ordinance;⁸ and the power of a city over

its streets, and the right of the public to them, extends upward indefinitely for the purpose of their preservation, safe use, and enjoyment.⁹ But city authorities cannot lawfully obstruct the streets with public or private buildings;¹⁰ nor can they sell the streets so long as they are held for public use;¹¹ nor can they confer upon a private person a right to use a street, or any portion of the same, for any purpose except for passing and repassing;¹² and in the absence of legislative authority, ordinary city authorities have no power to release the public right in a dedicated street.¹³ The streets of a city may, however, be appropriated to authorized purposes, promotive of the convenience of its inhabitants, and not substantially interfering with travel.¹⁴ And a town or city, having control of its streets, may allow property holders to adorn the same by setting out and caring for shade trees along their premises.¹⁵ The right to use the streets of a city for the purpose of furnishing gas to the inhabitants, at a profit, is a franchise, and can only emanate directly or indirectly from the sovereign power.¹⁶ But it is competent for the legislature to confer upon an individual or private company the exclusive right to manufacture and sell gas, and to erect works and lay pipes therefor within the limits of a municipal corporation;¹⁷ and it may grant to a private company, for a term of years, the exclusive use of the streets and alleys for the erection of water-works therein, and thus revoke the power of the city to use them.¹⁸ A charter power to prevent the encumbrance of sidewalks, etc., warrants not only the removal of what has become an obstruction thereon,¹⁹ but also measures to stop the erection of what will be one.²⁰ Under a power "to exercise control over the streets," and "to cause nuisances to be removed," city authorities may enact an ordinance impounding hogs going at large in the streets.²¹ And a city having the control of the streets, squares, etc., within its limits may, by ordinance, prohibit the appropriation of them to private use, such as sales by individuals at auction thereon.²²

1 See *Baird v. Rice*, 63 Pa. St. 489; *Sinton v. Ashbury*, 41 Cal. 525; *Litchfield v. Vernon*, 41 N. Y. 123; *Dubnque v. Maloney*, 9 Iowa, 450; *State v. Graves*, 19 Md. 351; *Inhabitants etc. v. New Orleans*, 14 La. An. 452.

2 *Commonw. v. Stodder*, 2 Cush. 562; *Commonw. v. Robertson*, 5 Id. 438; *Washington v. Nashville*, 1 Swan, 177; *Railroad Co. v. Buffalo*, 5 Hill, 209; *Gartside v. East St. Louis*, 43 Ill. 47.

3 *Dunham v. Hyde Park*, 75 Ill. 371.

4 *Smith v. Corp. of Washington*, 20 How. 135; *Himmelmann v. Hoadly*, 44 Cal. 213; and see *Fish v. Mayor etc.* 6 Paige, 268; *Creal v. Keocuk*, 4 Greene, 47; *Macy v. Indianapolis*, 17 Ind. 267. As to notice to property owners affected, of the intention to open or alter a street: see *State v. Morristown*, 34 N. J. L. 445; *State v. Elizabeth*, 32 Id. 357; *State v. Plainfield*, 38 Id. 85.

5 *State v. Morristown*, 33 N. J. L. 57.

6 *Sturtevant v. Alton*, 3 McLean, 393; and compare *People v. Flagg*, 17 N. Y. 584.

7 *Carter v. Chicago*, 57 Ill. 283; *Chicago v. Wright*, 69 Id. 318; *Kreigh v. Chicago*, 86 Id. 407; *Meth. E. Church v. Hoboken*, 33 N. J. L. 13; *Winona v. Huff*, 11 Minn. 119.

8 *Waco v. Powell*, 32 Tex. 258; *Pedrick v. Bailey*, 12 Gray, 161; *New York etc. R. R. Co. v. Mayor*, 1 Hill, 562; *Philadelphia v. Railroad Co.* 59 Pa. St. 253; *Fox v. Winona*, 23 Minn. 10.

9 *Grove v. Fort Wayne*, 45 Ind. 429; 15 Am. R. 262.

10 *Lutterloh v. Mayor etc.* 15 Fla. 306.

11 *People v. Albany*, 4 Hun, 675; *Meth. E. Church v. Hoboken*, 33 N. J. L. 13.

12 *Green v. Portland*, 32 Me. 431; *Smith v. Leavenworth*, 15 Kan. 81.

13 *Hoboken Land etc. Co. v. Mayor etc.* 36 N. J. L. 540; *St. Vincent Asylum v. City of Troy*, 76 N. Y. 108. Compare *Anderson v. Turberville*, 16 Cold. 150; *Riggs v. Board of Education*, 27 Mich. 262; *Trenor v. Jackson*, 15 Abb. Pr. N. S. 115; 46 How. Pr. 389.

14 *Tompkins v. Hodgson*, 2 Hun, 146; 4 *Thomp. & C.* 435; *State v. Cincinnati Gas Light Co.* 18 Ohio St. 262.

15 *Baker v. Normal*, 81 Ill. 108.

16 *State v. Cincinnati Gas Light Co.* 18 Ohio St. 262; and see *Norwich Gas Co. v. Norwich City Gas Co.* 25 Conn. 19; *Boston v. Richardson*, 13 Allen, 146, 160; *Queen v. Gas Co.* 2 El. & E. 651; *Reg. v. Sheffield Gas Co.* 22 Eng. L. & Eq. 200.

17 *State v. Milwaukee Gas Light Co.* 29 Wis. 454; 9 Am. R. 598.

18 *Memphis v. Memphis Water Co.* 5 Heisk. 495. Compare *West v. Baucroft*, 32 Vt. 367; *Kelsey v. King*, 32 Barb. 410.

19 *McCarthy v. Chicago*, 53 Ill. 38; and see *Sheen v. Slothart*, 29 La. An. 630.

20 *Fox v. Winona*, 23 Minn. 10.

21 *Waco v. Powell*, 32 Tex. 258.

22 *Shelton v. Mobile*, 30 Ala. 540; *White v. Kent*, 11 Ohio St. 550.

§ 294. Local improvements.—“Local improvements” are those made in a particular locality, by which the real property adjoining or near such locality is specifically benefited.¹ And the legislature may, in the
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exercise of the taxing power, impose the cost of such improvements upon the neighboring proprietors who are to be benefited thereby;² and it can delegate this power to local municipal governments;³ and may, moreover, empower the city authorities to judge what property is specially benefited by the improvement, and define the taxing district accordingly.⁴ But a statute authorizing an assessment for street improvements, being in derogation of individual rights, must be strictly construed, and rigorously observed.⁵ And any departure in substance from the formula prescribed by the statute vitiates proceedings under it.⁶ Nor can a city so ratify proceedings as to render them valid, if they were in the first instance invalid;⁷ the power to ratify, if it exists, is in the legislature.⁸ But property owners benefited, who suffer street improvements to be completed without remonstrance, thereby affirm the acts of their agents (the common council of a city) in making the improvements.⁹ The right of a municipal corporation to condemn the lands of individuals for local improvements can only be exercised in virtue of some express legislative grant;¹⁰ and the proceedings must comply strictly with all requirements of the law, or no title will be acquired.¹¹ If notice of the proceedings be not given when required, or if not given in the way prescribed, the proceedings are void.¹² So, if the charter require that an effort be made to purchase from the owner before condemnation of the property, and the property is condemned without its having been made, the proceedings are void.¹³ The owner of the property appropriated and used for a city improvement is entitled to compensation;¹⁴ and this rule applies where the use of private lands involved consists in flooding them with waste water.¹⁵ And if lands owned in fee by a municipal corporation are appropriated for the purpose of widening a public street, the corporation is entitled to compensation.¹⁶ It is not within the corporate power of a city to take the property of the state,¹⁷ or of the United States,¹⁸ for the purpose

of a public street.¹⁹ And under a general power to lay out and open streets, a city has no authority to lay out and open a street through the depot grounds of a railway company, so as to destroy or impair the value of the company's easement, acquired under an express legislative grant.²⁰ And property cannot in general be acquired against the owner's consent when wanted for purposes merely ornamental.²¹ But where the trustees of a village authorized the erection of a soldier's monument in one of the public streets, it was held that they could do so without the consent of the owner of the fee.²²

1 *Rogers v. City of St. Paul*, 22 Minn. 494.

2 *Palmer v. Morton*, 25 Mo. 593; *Motz v. Detroit*, 18 Mich. 495; *Woodhouse v. Burlington*, 47 Vt. 301; *Hundley v. Commissioners etc.* 67 Ill. 559; *Uhrig v. St. Louis*, 44 Mo. 458; *Broadway etc. Church v. McAtee*, 8 Bush, 508; *Matter of New Orleans*, 20 La. An. 497. Compare *St. John v. East St. Louis*, 50 Ill. 92; *State v. Mayor etc.* 36 N. J. L. 291; *Matter of Market St.* 49 Cal. 546; *Sinton v. Ashbury*, 41 Id. 525; *Morange v. Mix*, 44 N. Y. 315; *Willard v. Presbury*, 14 Wall. 676; *Glikeson v. Justices*, 13 Gratt. 577. But a local assessment for a general public benefit is unconstitutional: *Washington Avenue*, 69 Pa. St. 352; 8 Am. R. 255.

3 *Bradley v. McAtee*, 7 Bush, 667; 3 Am. R. 309.

4 *Moran v. Lindell*, 52 Mo. 229; *Hoyt v. East Saginaw*, 19 Mich. 39; 2 Am. R. 76; *Gest v. Cincinnati*, 26 Ohio St. 275.

5 *Hopkins v. Mason*, 42 How. Pr. 115; 61 Barb. 469; and see *Welker v. Potter*, 18 Ohio St. 85; *Hurford v. City of Omaha*, 4 Neb. 336.

6 *Merritt v. Village of Portchester*, 71 N. Y. 309.

7 *Meuser v. Risdon*, 38 Cal. 239.

8 *Meuser v. Risdon*, 36 Cal. 239.

9 *People v. Utica*, 45 How. Pr. 289; 65 Barb. 1. See *Bond v. Mayor etc.* 19 N. J. Eq. 376; *Lake v. Trustees*, 4 Denio, 520.

10 *Allen v. Jones*, 47 Ind. 433; *Water Works Co. v. Burkhart*, 41 Id. 364; *Dyckman v. Mayor*, 5 N. Y. 434. See tit. EMINENT DOMAIN.

11 *Newell v. Wheeler*, 48 N. Y. 496; *Matter of Schreiber*, 3 Abb. N. C. 68; *Harbeck v. Toledo*, 11 Ohio St. 219; *City of Stockton v. Whitmore*, 50 Cal. 554; *Nichols v. Bridgeport*, 23 Conn. 189; *New Orleans v. Rohr*, 16 La. An. 393; *Matter of Powers*, 29 Mich. 504; *Dennis v. Hughes*, 8 Up. Can. Q. B. 444; *McKernan v. Indianapolis*, 38 Ind. 223.

12 *Darlington v. Commonw.* 41 Pa. St. 68; *Baltimore v. Bouldin*, 23 Md. 328. Compare *State v. City of Plainfield*, 33 N. J. L. 95; *Re Zborowski*, 68 N. Y. 88; *Palmyra v. Morton*, 25 Mo. 593.

13 *Nicholson v. St. Louis*, 47 Mo. 499; *Leslie v. St. Louis*, Id. 474.

14 *Philadelphia v. Dickson*, 38 Pa. St. 247; *Mayor etc. v. Fitzpatrick*, 36 N. J. L. 120; *State v. Seymour*, 35 Id. 47.

15 *Pettigrew v. Evansville*, 25 Wis. 223.

16 *Matter of Ninth Avenue*, 45 N. Y. 729. Compare *Matter of Department of Public Parks*, 6 Hun. 486.

17 *Atlanta v. Central R. R. Co.* 53 Ga. 120.

18 *United States v. Chicago*, 7 How. 185.

19 *Atlanta v. Central R. R. Co.* 83 Ga. 130.

20 *Milwaukee etc. R. R. Co. v. City of Fairbault*, 23 Minn. 167.

21 See *Woodstock v. Gallup*, 23 Vt. 587; 29 Id. 347; *West River Bridge Co. v. Dix*, 6 How. 845; *Higginson v. Inhabitants etc.* 11 Allen, 530; *Blodgett v. Boston*, 8 Id. 257.

22 *Tompkins v. Hodgson*, 2 Hun, 146; 4 *Thomp. & C.* 435.

§ 295. Contracts for local improvements, etc.—

If the preliminaries to be observed, and the manner in which a contract for a local improvement shall be entered into, are prescribed by a mandatory charter provision or law, its directions must be complied with;¹ otherwise, the contract cannot be enforced.² So, a city may prescribe, by ordinance, the manner in which the officers charged with negotiation of a contract for an improvement shall proceed in making it;³ and if the requirements of such ordinance are mandatory, and are not complied with, the contract will not be valid.⁴ If the charter requires contracts for improvements to be in writing, a verbal executory agreement of the common council to employ a person to make improvements cannot bind the city.⁵ If the charter prohibits any expense to be incurred, unless an appropriation has been previously made to cover it, the municipal body will not be bound by contracts involving liability beyond the amount appropriated.⁶ And generally, where the mode of action of a municipal corporation is limited by its charter, persons undertaking a contract for a local improvement must take notice of the restriction.⁷ If the law requires that contracts shall be made by advertising for proposals, and by awarding them to the lowest bidder, and the bids are opened and the award made accordingly, a contract is thereby created.⁸ These proceedings vest in the bidder a right, of which he cannot be divested without compensation, and create a liability on the part of the corporation to him.⁹ And the city officers have no authority, after the bids have been opened, to alter the contract materially, and then award it to one of the original bidders, without a new advertisement.¹⁰ If the advertise-

ment for bids contains a reservation of the right to reject all bids if unsatisfactory, the lowest bidder has no right of action against the corporation, either for refusing his bid, or for his time and expenses in preparing his estimates and proposals.¹¹ And the corporation may voluntarily increase the contract price for work, where the circumstances will equitably justify it, unless prohibited by its charter from doing so.¹² A requirement that contracts for work shall be founded on bids and proposals upon a public notice does not embrace a contract for the purchase of fireworks for a Fourth of July celebration;¹³ nor a contract of carriage hire of city officers while engaged in public duties;¹⁴ nor to contracts for services which require in their performance scientific knowledge or professional skill, such as the services of a surveyor.¹⁵

1 *Terre Haute v. Lake*, 43 Ind. 480; *People v. San Francisco*, 36 Cal. 595; *Butler v. Charlestown*, 7 Gray, 12.

2 *McEwen v. Gilker*, 38 Ind. 233; *Baltimore v. Eschbach*, 18 Md. 276. Compare *Yarnold v. City of Lawrence*, 15 Kan. 126.

3 *Starr v. City of Burlington*, 45 Iowa, 87.

4 *Himmelmann v. Satterlee*, 50 Cal. 68; *Kretsch v. Helm*, 45 Ind. 438; and see *Brady v. Mayor etc.* 20 N. Y. 312; 18 How. Pr. 343.

5 *Starkey v. Minneapolis*, 19 Minn. 203. Compare *Alton v. Mulledy*, 21 Ill. 76; *Bigelow v. Perth Amboy*, 25 N. J. L. 297.

6 *Kingsland v. Mayor etc.* 5 Daly, 448.

7 *Murphy v. Louisville*, 9 Bush, 189; and see *Saxton v. St. Joseph*, 60 Mo. 153; *Schumm v. Seymour*, 24 N. J. Eq. 143; *Johnson v. Common Council*, 18 Ind. 227.

8 *Argenti v. San Francisco*, 16 Cal. 255; *Matter of Protestant etc. School*, 40 How. Pr. 130; 53 Barb. 161. See *Curtis v. Waterloo*, 38 Iowa, 266; *Smith v. Mayor etc.* 10 N. Y. 504.

9 *Matter of Protestant etc. Church*, 40 How. Pr. 130; 53 Barb. 161. Compare *Yarnold v. City of Lawrence*, 15 Kan. 126; *Brady v. Mayor etc.* 18 How. Pr. 343; 20 N. Y. 312.

10 *Dickinson v. Poughkeepsie*, 7 Hun, 1. Compare *Brevoort v. Detroit*, 24 Mich. 322; *Flindley v. Pittsburg*, 82 Pa. St. 351.

11 *Palmer v. Inhabitants etc.* 98 Mass. 487.

12 *Meech v. Buffalo*, 29 N. Y. 196.

13 *Detwiler v. Mayor etc.* 1 Thomp. & C. 657; 46 How. 218.

14 *Smith v. Mayor etc.* 21 How. Pr. 1.

15 *People v. Flagg*, 16 How. 36; 5 Abb. Pr. 232; 17 N. Y. 584. A contract with a city for grading a street or other improvement does not involve personal knowledge, skill, and experience in such a sense as to prevent an assignment of the contract: *St. Louis v. Clements*, 42 Mo. 70; and see *Philadelphia v. Lockhardt*, 73 Pa. St. 211; *Devlin v. Mayor etc.* 63 N. Y. 8; 50 How. 1; *Keffenbaugh v. Common Council*, 40 Ind. 382.

§ 296. Power to grant licenses, etc.—Municipal corporations may be authorized to require persons exercising vocations within their limits, to take out licenses therefor,¹ and may require the payment of a reasonable sum in consideration of the license,² unless there is some specific limitation on the authority of the legislature in these respects.³ And this is so, although such persons have already obtained licenses from the state to prosecute their respective callings;⁴ and the power may be exercised over all persons plying the vocation within the corporate limits, whether they reside within them or not.⁵ It is even competent for the legislature, in the absence of constitutional restrictions, to empower a municipality to license within its limits occupations which are illegal and punishable under the general laws of the state.⁶ But the right to license occupations, etc., must be plainly conferred;⁷ and power to license and regulate a lawful and necessary business confers no authority to make a contract creating or tending to create a monopoly.⁸ The power cannot be delegated by the common council to a particular officer to grant or refuse licenses as he sees fit;⁹ but must be exercised by the common council prescribing general rules under which a license may be obtained.¹⁰ A power to license and control vehicles authorizes an ordinance requiring persons intending to transport coal through the city streets to take out licenses for their vehicles, and pay a fee therefor;¹¹ but it does not authorize a tax upon vehicles used by the owners for their own convenience, or in the transaction of their own private business, and not engaged in any public employment for compensation.¹² A city ordinance prohibiting the sale of intoxicating liquors without a license is constitutional,¹³ in the absence of general laws of the state controlling the sale of intoxicating liquors.¹⁴ And a city council may impose a license fee on sales of beer or ale not manufactured in the city, without infringing the power of Congress to regulate commerce, except as to

beer shown to have been manufactured in another state.¹⁵ And a city may impose a license fee upon an express company desiring to transact business within the corporate limits, although the business of the company extends beyond the limits of the state.¹⁶ A license granted upon certain specified conditions may be revoked as a penalty for a violation of the conditions.¹⁷

1 City of Boston v. Schaffer, 9 Pick. 415; Slaughter v. Commonw. 13 Gratt. 767; Baker v. Cincinnati, 11 Ohio St. 534; Fretwell v. City of Troy, 18 Kan. 271; Perdue v. Ellis, 18 Ga. 586; City of Burlington v. Lawrence, 42 Iowa, 681; Lick v. State, 42 Miss. 316.

2 State v. Herod, 29 Iowa, 123; Durach's Appeal, 62 Pa. St. 491; Norwich Gaslight Co. v. Norwich City Gas Co. 25 Conn. 19; Hodgson v. New Orleans, 21 La. An. 301; Osborne v. Mobile, 44 Ala. 493.

3 Savannah v. Charlton, 36 Ga. 460; Mayor etc. v. Uille, 3 Ala. 157; Welch v. Hotchkiss, 39 Conn. 140; People v. Mulholland, 10 N. Y. Week. Dig. 664.

4 State v. Columbia, 6 Rich. 1; Wright v. Mayor etc. 54 Ga. 645.

5 Commissioners etc. v. Capehart, 71 No. Car. 156; City of Memphis v. Battelle, 8 Helsk. 524.

6 Davis v. State, 2 Tex. Ct. App. 425. Compare Burlington v. Lawrence, 42 Iowa, 681; Burlington v. Baumgardner, 1d. 673; Little v. City of Madison, 49 Wis. 605; 35 Am. R. 793.

7 Dunham v. Trustees etc. 5 Cowen. 462; Mays v. Cincinnati, 1 Ohio St. 269; Piquemine v. Roth, 29 La. An. 261. And see Leonard v. Canton, 35 Miss. 189.

8 Gale v. Kalamazoo, 23 Mich. 344; 9 Am. R. 80; Tugman v. Chicago, 78 Ill. 405; Hayes v. Appleton, 24 Wis. 542; Logan v. Pyne, 43 Iowa, 524. And compare Barling v. West, 29 Wis. 307; Tuckahoe Canal Co. v. Tuckahoe R. R. Co. 11 Leigh. 42; Missouri v. Fisher, 52 Mo. 47; Commonw. v. Brooks, 109 Mass. 353.

9 East St. Louis v. Wehrung, 50 Ill. 28.

10 Darling v. St. Paul, 19 Minn. 389; Kinmundy v. Mahan, 72 Ill. 463. Compare Decorah v. Dunstan, 38 Iowa, 16.

11 Gartside v. East St. Louis, 43 Ill. 47.

12 St. Louis v. Grone, 46 Me. 574. And see Collinsville v. Cole, 75 Ill. 114.

13 City Council v. Ahrens, 4 Strob. 241. See Howe v. Treasurer etc. 37 N. J. L. 145; Kitson v. Ann Arbor, 26 Mich. 325.

14 Helsenbrittle v. City Council, 2 McMull. 233. Compare Ex parte Burnett, 30 Ala. 461; State v. Clark, 28 N. H. 176; State v. Freeman, 38 Id. 428.

15 Downham v. Alexandria, 10 Wall. 173.

16 Osborne v. Mobile, 16 Wall. 479. Compare Woodruff v. Parham, 41 Ala. 334.

17 Hurber v. Baugh, 43 Iowa, 514.

§ 297. Abatement of nuisances.—Municipal corporations are liberally endowed with power to prevent

and abate nuisances,¹ and to punish the authors of them by penalties, fines, and imprisonment.² But a municipal corporation cannot, in the absence of any general laws upon the subject, and by the mere declaration that a thing is a nuisance, subject it to removal by any person supposed to be aggrieved, or even by the corporation itself.³ In general, the municipal authorities may not declare anything a nuisance which cannot be detrimental to the health of the place, or dangerous to the citizens, or a public inconvenience;⁴ and not even then, where the thing complained of exists by legislative sanction.⁵ A power to enact ordinances relative to nuisances authorizes the municipal authorities to impose penalties on the keepers of "houses of ill-fame," and on persons owning houses used, with their knowledge, for such purposes;⁶ but it does not authorize them to demolish a building so occupied and used;⁷ and individuals have no right to abate the nuisance occasioned by such occupation and use by demolishing the building.⁸ A board of trustees of a town, with power to "abate and remove nuisances," have not power to prohibit in advance the establishment of any cemetery, except as authorized by the board.⁹ So a dead animal is not *per se* a nuisance;¹⁰ and to justify the removal of "dead animals," under an ordinance providing for their removal, "so as most effectually to secure the public health," it must be shown that they were or would become in some way dangerous to public health.¹¹ But under a power to make by-laws relative to nuisances, a municipal corporation may prohibit, by ordinance, the keeping of a bowling-alley for gain or hire.¹² So it may abate as a nuisance the cornice of a building which projects over a sidewalk in such a way as to be dangerous to persons using the sidewalk;¹³ and the same is true as it respects a vacant building, which is so used as to endanger by fire the property of others, or the health of the community.¹⁴ So a city, whose duty it is to prevent obstructions in a river within its limits, may abate or re-

move anything which obstructs the free and common use of the river.¹⁵ And the legislature may authorize city authorities to seclude persons affected with contagious diseases.¹⁶

1 Kennedy v. Phelps, 10 La. An. 227; Roberts v. Ogle, 30 Ill. 459; Gregory v. New York, 40 N. Y. 273; Baker v. Boston, 12 Pick. 184; Union Railway Co. v. Mayor etc. 11 Allen, 287; Babcock v. Buffalo, 56 N. Y. 268.

2 Vandyke v. Cincinnati, 1 Dian. 532; Lake View v. Letz, 44 Ill. 81; Nolan v. Mayor etc. 4 Yerg. 163.

3 Yates v. Milwaukee, 10 Wall. 497; and see Darst v. People, 51 Ill. 286; 2 Am. R. 301; Pye v. Peterson, 45 Tex. 312; Chicago etc. R. R. Co. v. Joliet, 79 Ill. 28.

4 See Shleen v. Slothart, 29 La. An. 630; Waco v. Powell, 32 Tex. 253; Coates v. Mayor etc. 7 Cow. 585; Commonw. v. Goodrich, 13 Allen, 546; Green v. Savannah, 6 Ga. 1.

5 State v. Jersey City, 5 Dutch. 170.

6 McAllister v. Clark, 33 Conn. 91; and see Shafer v. Mumma, 17 Md. 331.

7 Welch v. Stowell, 2 Doug. (Mich.) 332; Miller v. Burch, 32 Tex. 296; 5 Am. R. 242; and see Clark v. Mayor etc. 13 Barb. 32.

8 Ely v. Supervisors, 36 N. Y. 297; Moody v. Supervisors etc. 46 Barb. 659; Goldsmith v. Jones, 43 How. Pr. 415.

9 Lake View v. Letz, 44 Ill. 81.

10 Underwood v. Green, 42 N. Y. 140.

11 Underwood v. Green, 42 N. Y. 140.

12 Tanner v. Trustees etc. 5 Hill, 121; and see Jackson v. People, 9 Mich. 111; State v. Hay, 29 Me. 457; Updike v. Campbell, 4 Smith, E. D. 570. But compare State v. Hull, 32 N. J. L. 168.

13 Grove v. Fort Wayne, 45 Ind. 429; and see Kiley v. City of Kansas, 69 Mo. 102; 33 Am. R. 491.

14 Harvey v. Dewoody, 18 Ark. 252; and see Ferguson v. City of Salina, 43 Ala. 396.

15 Hart v. Mayor etc. 9 Wend. 571; and see People v. Vanderbilt, 28 N. Y. 396; Hoeft v. Seaman, 46 How. Pr. 24; 6 Jones & B. 62.

16 Havery v. Bass, 66 Me. 71; Ogg v. Lansing, 35 Iowa, 495.

§ 298. Regulation of markets.—A market is a designated place in a town or city to which all persons can repair who wish to buy or sell articles there exposed for sale.¹ Municipal corporations have, very generally, the power to establish and regulate markets within their limits;² the extent and limits of the power possessed by a particular corporation depending upon its charter.³ Grants of power in this respect will be liberally construed;⁴ but not so as to warrant an ordinance in restraint of trade, and tending to create a monopoly.⁵ A

charter power to make such necessary ordinances, etc., as may tend to the "good government of the town," confers discretionary power to build and repair a market-house,⁶ and also power to lease a building for market purposes.⁷ And power "to establish" a market authorizes, as a necessary incident, the purchase of ground upon which to erect a market-house;⁸ but gives no authority to erect one on a public street.⁹ Power to establish and regulate markets is a continuing one,¹⁰ and markets once established may be abandoned or changed at the pleasure of the corporation.¹¹

1 *Caldwell v. Alton*, 33 Ill. 416; and compare *Cincinnati v. Buckingham*, 10 Ohio, 257.

2 *Cougot v. New Orleans*, 16 La. An. 21; *Spaulding v. Lowell*, 23 Pick. 71; *Bowling Green v. Carson*, 10 Bush. 64; *Yates v. Milwaukee*, 12 Wis. 673; and see *Mayor etc. v. Pedley*, 4 Barn. & Adol. 397; *Bex v. Cottrell*, 1 id. 67; *In re Fennell etc.* 24 Up. Can. Q. B. 238.

3 See *New Orleans v. Stafford*, 27 La. An. 417; *Atlanta v. White*, 33 Ga. 229; *Le Claire v. Davenport*, 13 Iowa, 210.

4 *St. Louis v. Weber*, 44 Mo. 547; *Wartman v. Philadelphia*, 33 Pa. St. 202; *White v. Kent*, 11 Ohio St. 550; *Ketchum v. Buffalo*, 14 N. Y. 356; *Winsboro v. Smart*, 11 Rich. 551.

5 *Gale v. Kalamazoo*, 23 Mich. 344; *Bloomington v. Wahl*, 46 Ill. 489; and see *Peck v. Austin*, 22 Tex. 261. Compare *Le Claire v. Davenport*, 13 Iowa, 210.

6 *Smith v. City of Newbern*, 70 No. Car. 460. As to the duty of a municipal corporation to keep a market in repair: see *Mayor etc. v. Cullens*, 38 Ga. 334.

7 *Wade v. City of Newbern*, 77 No. Car. 14.

8 *Gale v. Kalamazoo*, 23 Mich. 344; 9 Am. R. 80; *Caldwell v. Alton*, 33 Ill. 416; *People v. Lowber*, 7 Abb. Pr. 158; 28 Barb. 65.

9 *Wartman v. Philadelphia*, 33 Pa. St. 202. Compare *State v. Lavcrack*, 34 N. J. L. 201.

10 *Gall v. Cincinnati*, 18 Ohio St. 563.

11 *Gall v. Cincinnati*, 18 Ohio St. 563; *Wartman v. Philadelphia*, 33 Pa. St. 202.

§ 299. Powers as to taxation.—Municipal corporations have no inherent power to levy taxes;¹ but the legislature may constitutionally delegate the power to them to be exercised for the support of their local governments.² The power must be conferred either in express words,³ or by necessary implication,⁴ and it must be construed in subordination to the general tax laws of the state, unless a contrary intent is clearly indicated.⁵ And

the power of the legislature to authorize a municipal corporation to tax the inhabitants is confined to taxes for public objects in which the inhabitants have a general interest.⁶ The power of the state to tax trades, etc.,⁷ may, however, be delegated to municipal corporations;⁸ but the power must be impartially exercised by them, and they have no right to discriminate in taxing privileges between merchants and other dealers residing without the corporation, and members of the same class residing within the corporate limits.⁹ But a tax on business and avocations, fixing a different rate of taxation for each distinct business or avocation, does not violate a constitutional provision requiring all taxes to be uniform.¹⁰ A statute exempting particular property from municipal taxation is not unconstitutional.¹¹ But property "exempted from taxation of every kind,"¹² or from "any tax or public imposition whatever,"¹³ is not exempted from special assessments for street improvements in front of the property.¹⁴ And a general statute exempting from taxation property used for religious purposes does not exempt such property from assessments for local improvements.¹⁵ A charter power to assess taxes and licenses implies a right to enforce their payment by judicial proceedings.¹⁶ And where municipal authorities have the power and are under a duty to levy a tax to pay a debt or demand, the performance of the duty may be enforced by mandamus.¹⁷ The federal constitution prohibits the states from levying any duty on tonnage, without the consent of Congress;¹⁸ but the assessment of a vessel owned in a city, by the city assessor for city taxes, is not a "duty of tonnage" within such prohibition.¹⁹

1 *Wheatly v. Covington*, 11 Bush, 18; *Bull v. Read*, 13 Gratt. 78; *Vance v. Little Rock*, 30 Ark. 435; *Dalley v. Swope*, 47 Miss. 367; and see tit. TAXATION.

2 *New Orleans v. Turnin*, 13 La. An. 56; *Gilkeson v. Frederick County*, 13 Gratt. 577; *Durach's Appeal*, 62 Pa. St. 491; *Primm v. City of Belleville*, 59 Ill. 142; *Osborne v. Mobile*, 44 Ala. 493; *New Orleans v. Poutz*, 14 La. An. 553.

3 *Clark v. Davenport*, 14 Iowa, 494; *Council of Augusta v. Dunbar*, 50 Ga. 387; *Pullen v. Commissioners*, 68 No. Car. 451.

4 Iowa R. R. Land Co. v. County of Sac, 39 Iowa, 124; St. Mary's Industrial School v. Brown, 45 Md. 310; and see *Ex parte Parsons*, 1 Hughes, 282; Loan Assoc. v. Topeka, 29 Wall. 655. When such corporations are created, the power of taxation is vested in them as an essential attribute for all the purposes of their existence, unless its exercise be in express terms prohibited: United States v. New Orleans, 94 U. S. 361. But the courts of the United States can impart no taxing power to a municipal corporation: Vance v. Little Rock, 30 Ark. 435.

5 Howell v. Village of Cassopolis, 35 Mich. 471; and see Mayor etc. v. Thomas, 5 Cold. 609.

6 People v. State Treasurer, 23 Mich. 499; Loan Assoc. v. Topeka, 29 Wall. 655; and see § 291, *ante*.

7 See Keller v. State, 11 Md. 525; Mason v. Lancaster, 4 Bush, 406; Nashville v. Althrop, 5 Cold. 554.

8 St. Louis v. Laughlin, 49 Mo. 569; Carroll v. Mayor etc. 12 Ala. 173; and see § 296, *ante*.

9 City Council v. State, 2 Speers, 719; Nashville v. Althrop, 5 Cold. 554.

10 State v. Columbia, 6 Rich. 1. Compare Cobb v. Elizabeth City, 75 No. Car. 1; Mobile v. Dargan, 45 Ala. 310.

11 Richmond v. Richmond etc. R. R. Co. 21 Gratt. 604.

12 Sheehan v. Good Samaritan Hospital, 50 Mo. 155; 11 Am. R. 412.

13 Baltimore v. Cemetery Co. 7 Md. 517.

14 See Brightman v. Kirner, 22 Wis. 54; Paine v. Spratley, 5 Kan. 825; § 294, *ante*.

15 Baptist Church v. McAtee, 8 Bush, 508; 8 Am. R. 480; First Presby. Church v. Fort Wayne, 36 Ind. 338; 10 Am. R. 35.

16 Amite City v. Clements, 24 La. An. 27; and see Dubuque v. Illinois Cent. R. R. Co. 39 Iowa, 58.

17 State v. Milwaukee, 25 Wis. 122; Britton v. Platte City, 2 Dill. 1; Heine v. Levee Commissioners, 19 Wall. 655; and see *ut. MANDAMUS*.

18 U. S. Const. art. 1, § 10, subd. 2.

19 The North Cape, 6 Biss. 505.

§ 300. **Liabilities of, in general.**—Where duties of a judicial nature are imposed upon a municipal corporation, the due execution of which requires the exercise of deliberation, judgment, and discretion, the corporation is exempt from all responsibility by action for the motives which influence it, and for the manner in which such duties are performed.¹ Such a corporation, being public and sovereign in its nature, is not liable to be sued either for a failure to exercise powers intrusted to the judgment and discretion of its proper authorities, or for errors committed in their exercise.² Thus, the failure of the corporate authorities to exercise the power to the full

extent necessary to protect the city from damages by fire, does not render the city liable to an action therefor;³ and in general, no action lies to charge a city for damages for results of defective municipal legislation.⁴ But where judicial duty ends, and ministerial duty begins, there immunity ceases and liability attaches.⁵ And where a duty of general interest is enjoined upon the corporation, and it appears that the burden was imposed in consideration of the privileges granted and enjoyed, and the means to perform the duty are placed at the disposal of the corporation, it is clearly liable to the public for an unreasonable neglect to comply with the requirement of the charter.⁶ In respect to such duties, a town or city is not a mere municipal corporation, but is a private one, and liable as an individual would be under the same circumstances.⁷ And municipal corporations are in general liable upon their authorized contracts to the same extent as private corporations or natural persons.⁸ And in certain cases, an action may be maintained against a municipal corporation upon an implied promise;⁹ but never in a case where the corporation possesses no power to contract.¹⁰ But a contract duly made by a municipal corporation, under authority of a statute, cannot be impaired by a subsequent act amending the statute so as to take away the power of the corporation to make such contract.¹¹ An illegal and void tax or license fee collected by a city may be recovered back in an action against the corporation,¹² irrespective of its having been collected by compulsion, or paid under protest.¹³ And a purchaser of city bonds, which are void for want of authority in the city to issue them, may recover back from the city the amount paid, as for a failure of the consideration.¹⁴

1 *Comm'rs v. Duckett*, 20 Md. 468; *Jones v. New Haven*, 34 Conn. 1; *Duke v. Mayor etc.* 20 Ga. 635; *Weightman v. Washington*, 1 Black, 39.

2 *Brinkmeyer v. Evansville*, 29 Ind. 187; *Barton v. Syracuse*, 37 Barb. 292; 38 N. Y. 54; *Hill v. Boston*, 123 Mass. 344; and see *Hill v. Charlotte*, 72 No. Car. 55; *Hart v. Bridgeport*, 13 Blackf. 289.

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3 *Wheeler v. Cincinnati*, 19 Ohio St. 19; *Brinkmeyer v. Evansville*, 29 Ind. 187; *Hafford v. New Bedford*, 16 Gray, 297; and see *Schattner v. Kansas City*, 53 Mo. 162.

4 *Saxton v. St. Joseph*, 80 Mo. 153.

5 *Jones v. New Haven*, 34 Conn. 1; *Lacour v. Mayor etc.* 3 Duer, 406; *Lloyd v. Mayor etc.* 5 N. Y. 369. See *Little Rock v. Willis*, 27 Ark. 572; *Sheldon v. Kalamazoo*, 24 Mich. 333.

6 *Richmond v. Long*, 17 Gratt. 375; *Weightman v. Washington*, 1 Black, 29; *Weet v. Trustees etc.* 16 N. Y. 161, note.

7 *Jones v. New Haven*, 34 Conn. 1.

8 *Sillicocks v. Mayor etc.* 11 Hun, 431; *Hard v. City of Decorah*, 43 Iowa, 313; *Hood v. Lynn*, 1 Allen, 103; *Topsam v. Rogers*, 42 Vt. 189. See tit. ULTIMA VIRES.

9 *Harlem Gas Light Co. v. Mayor etc.* 3 Robt. 100; 33 N. Y. 309; *Seagraves v. Alton*, 13 Ill. 366; *Gas Co. v. San Francisco*, 9 Cal. 433; *Pimental v. San Francisco*, 21 Id. 351; and see *Parks v. Waltham*, 120 Mass. 160.

10 *Burrill v. Boston*, 2 Cliff. 590; and compare *Springfield Milling Co. v. Lane Co.* 5 Oreg. 265; *French v. Auburn*, 62 Me. 452; *Kollock v. Stevens Point*, 37 Wis. 348; *McDonald v. Mayor etc.* 1 Hun, 719; 4 *Thomp. & C.* 177.

11 *Goodale v. Fennell*, 27 Ohio St. 426; and see *State v. Heath*, 20 La. An. 172; *Earle v. Wallingford*, 44 Vt. 367; *Allegheny City v. McClurken*, 14 Pa. St. 81. Compare *Rittenhouse v. Mayor etc.* 26 Md. 336.

12 *First Ecclesiastical Soc. v. Hartford*, 38 Conn. 274; *Supervisors v. Mauny*, 56 Ill. 160; *Powers v. Sanford*, 39 Me. 183.

13 *Callaway v. Mayor etc.* 48 Ga. 189; *Steamboat Co. v. New Orleans*, 23 Int. Rev. Rec. 19; *Galveston v. Synchron*, 39 Tex. 236. Compare *Jenks v. Lima Township*, 17 Ind. 326; *Baker v. Cincinnati*, 11 Ohio St. 534; *Cook v. Freeholders*, 2 Dutch. 326; *Haines v. School District*, 41 Me. 246.

14 *Paul v. City of Kenosha*, 32 Wis. 266; and see *Herzo v. San Francisco*, 33 Cal. 134; *Allen v. Cameron*, 3 Dill. 198; *De Voss v. Richmond*, 18 Gratt. 338.

§ 301. Liability for acts of officers or agents.—In general, if the officer or agent of a municipal corporation is in the exercise of a power conferred upon the corporation for its private benefit, and injury ensues from the misfeasance or negligence of such officer or agent, the corporation is liable, as in the case of private corporations or individuals.¹ But when the acts or omissions complained of were done or omitted in the exercise of a corporate franchise conferred upon the corporation for the public good, and not for private corporate advantage, then the corporation is not liable for the consequences of such acts or omissions on the part of its officers and agents.² Where the thing done lies wholly beyond the corporate

powers, the corporation cannot be held liable, whether it directly commanded the performance of the act, or the act was done by its officers without express command.³ And in order to render a municipal corporation liable for wrongs committed by persons claiming to act for it, the proof must show either that the act was expressly authorized,⁴ or done in good faith in pursuance of a general authority,⁵ or that, having been done without full authority, it was afterwards adopted or ratified by the corporation.⁶ And the corporation is not liable for the acts or omissions of duty of independent officers, whose duties are specifically prescribed by law, although appointed by the corporation.⁷ In this respect, the officers are *quasi* civil officers of the government, though appointed by the corporation;⁸ but it may be held liable for the acts of those who are in law its agents, though they may not be appointed by itself.⁹ A municipal corporation is not liable, unless by statute, for the negligence of the persons acting in its fire department;¹⁰ nor for the negligence of its officers or agents in executing sanitary regulations adopted for the purpose of preventing the spread of contagious disease;¹¹ nor for the neglect or unskillfulness of selectmen or physicians employed by the town, in consequence of which the small-pox spreads and the plaintiff catches it;¹² nor is a city liable for the trespasses and unlawful acts of violence of its police officers;¹³ nor is it liable to an action for damages for the illegal arrest of a citizen by one of its police officers.¹⁴ But the doctrine of *respondent superior* applies, and a city may be held liable for the trespasses of an officer, when he acts not only as a public officer, but also under express authority of the city government, and in the attempt to obey its directions.¹⁵ So a city is not in general liable for injuries caused by the negligence of a contractor in performing work under a contract between him and the city government;¹⁶ but it is otherwise where the relation of master and servant is shown to exist between them.¹⁷

- 1 *Murtaugh v. St. Louis*, 44 Mo. 479; and see § 300, *ante*.
- 2 *Murtaugh v. St. Louis*, 44 Mo. 479; *Hart v. Bridgeport*, 13 Blatchf. 279; and see *Richmond v. Long*, 17 Gratt. 375; *Mead v. New Haven*, 40 Conn. 72; *Hann v. Mayor etc.* 5 Jones & S. 458.
- 3 *Cole v. Nashville*, 4 Sneed, 162; *Morrison v. Lawrence*, 98 Mass. 219; *Cumberland etc. Canal Co. v. Portland*, 62 Me. 504; *Chelsea v. Washington*, 48 Vt. 610; *Thomson v. Boonville*, 61 Mo. 262; *Hanvey v. City of Rochester*, 35 Barb. 177; *Harrison v. Columbia*, 44 Tex. 418; *Chicago v. Turner*, 80 Ill. 419; *Smith v. City of Rochester*, 78 N. Y. 506; *Hunt v. Boonville*, 65 Mo. 620; 27 Am. R. 239.
- 4 *Thayer v. City of Boston*, 19 Pick. 511; *Buffalo etc. Turnp. Co. v. Buffalo*, 68 N. Y. 639; *Lee v. Sandy Hill*, 40 Id. 442.
- 5 *Buffalo etc. Turnp. Co. v. Buffalo*, 68 N. Y. 639; *Chicago v. McGraw*, 75 Ill. 568.
- 6 *Sherman v. Grenada*, 51 Miss. 186; and see *Arlington v. Pierce*, 122 Mass. 279; *Peterfield v. Vickers*, 3 Cold. 205; *Fox v. Northern Liberties*, 3 Watts & S. 103.
- 7 *Maxmillan v. Mayor etc.* 2 Hun. 263; 62 N. Y. 160; 20 Am. R. 468; and see *Lorillard v. Town of Monroe*, 11 N. Y. 392; *Sherbourne v. Yuba Co.* 21 Cal. 113; *Wheeler v. Cincinnati*, 19 Ohio St. 19; *Dunbar v. Boston*, 112 Mass. 75; *Sutton v. Board of Police*, 41 Miss. 236; *Barnes v. District of Columbia*, 91 U. S. 540.
- 8 *Martin v. Mayor etc.* 1 Hill, 545; and compare *Prather v. Lexington*, 13 Mon. B. 539.
- 9 *Commissioners v. Duckett*, 20 Md. 468.
- 10 *Hayes v. Oshkosh*, 32 Wis. 314; *Howard v. San Francisco*, 51 Cal. 82; *Torbush v. Norwich*, 38 Conn. 225; *Heller v. Mayor etc.* 63 Mo. 159.
- 11 *Ogg v. City of Lansing*, 35 Iowa, 495; 14 Am. R. 499; and see *Small v. Danville*, 61 Me. 359; *Barbour v. Ellsworth*, 67 Id. 294; *Rielly v. Philadelphia*, 60 Pa. St. 467.
- 12 *Brown v. Vinahaven*, 65 Me. 402.
- 13 *Dargon v. Mobile*, 31 Ala. 469; *Kimball v. Boston*, 1 Allen, 417; and see *Elliott v. Philadelphia*, 7 Phila. 128.
- 14 *Cook v. Mayor etc.* 54 Ga. 468; *Calwell v. City of Boone*, 51 Iowa, 687; 33 Am. R. 154; *Burch v. Hardwick*, 30 Gratt. 24; 32 Am. R. 640.
- 15 *Woodcock v. Calais*, 66 Me. 234.
- 16 *Pack v. New York*, 8 N. Y. 222; *Painter v. Pittsburg*, 46 Pa. St. 213; *Reed v. Allegheny City*, 79 Id. 300.
- 17 *Barry v. St. Louis*, 17 Mo. 121; and compare *Mayor etc. v. Bailey*, 2 Denio, 433; *Phinlay v. Augusta*, 47 Ga. 260.

§ 302. Construction and repair of sewers.—The duty to construct sewers is, in its nature, judicial,¹ and a city incurs no liability for the entire omission to construct them.² But having determined upon their construction, the duties of constructing them properly and keeping them in good condition and repair are ministerial;³ and negligence in the discharge of such duties will render the corporation liable for the resulting damages.⁴ And there must be skill and care in determining the capacity of the

sewer to carry off the water, as well as in the mere mechanism of its construction.⁵ And the liability of a city extends to injury sustained through actual neglect of its agents or servants to use, in the maintenance of a sewer, that care and prudence which a discreet man would use if the risk were wholly his own.⁶ This involves the exercise of a reasonable degree of watchfulness in ascertaining the condition of sewers from time to time, and preventing obstructions and dilapidation;⁷ but where the city is without fault in this respect, it is not liable for injuries caused by obstructions accumulating in a sewer, unless notice of such obstructions to the city is proved or may be presumed.⁸ Nor is a city liable for injuries from the mere abandonment of a sewer.⁹ It may, in its discretion, discontinue a sewer,¹⁰ and if the inhabitants are not thereby left in a worse condition than if the sewer had never been made, the city will not be liable for injuries caused by the flow of surface water.¹¹

1 City Council v. Gilmer, 33 Ala. 116; Child v. Boston, 4 Allen, 41; McCarthy v. Syracuse, 46 N. Y. 194; and see Munn v. Pittsburg, 40 Pa. St. 364; Stoudinger v. Newark, 28 N. J. Eq. 187.

2 Carr v. Northern Liberties, 35 Pa. St. 324; Mills v. Brooklyn, 32 N. Y. 489; Smith v. Mayor etc. 66 Id. 295; 23 Am. R. 53.

3 Jones v. New Haven, 34 Conn. 1.

4 Sluimer v. City of St. Paul, 23 Minn. 408; Ashley v. Port Huron, 35 Mich. 2-6; 24 Am. R. 552; Harper v. Milwaukee, 30 Wis. 365; Dorman v. Jacksonville, 13 Fla. 538; Donohue v. Mayor etc. 3 Daly, 65; Boston Rolling Mills v. Cambridge, 117 Mass. 398; Savannah v. Waldner, 4 Ga. 316; Merrifield v. Worcester, 110 Mass. 216; 14 Am. R. 592; Bradt v. Albany, 5 Hun, 591; Beach v. Elmira, 22 Id. 158; City of Joliet v. Harwood, 86 Ill. 110; 28 Am. R. 17.

5 Lewenthal v. Mayor etc. 61 Barb. 511; 5 Lans. 532; Indianapolis v. Huffer, 30 Ind. 235; and see Mayor etc. v. Thompson, 29 Ark. 569. But compare Mills v. Brooklyn, 32 N. Y. 489; Fair v. Philadelphia, 69 Pa. St. 369; 32 Am. R. 455; City of Denver v. Capell, 4 Colo. 25; 34 Am. R. 62.

6 Rowe v. Portsmouth, 56 N. H. 291; 22 Am. R. 464; Masterton v. Mt. Vernon, 58 N. Y. 391. Compare Murphy v. Lowell, 129 Mass. 396; 35 Am. R. 361.

7 McCarthy v. Syracuse, 46 N. Y. 194.

8 Rowe v. Portsmouth, 56 N. H. 291; 22 Am. R. 464; Smith v. Mayor etc. 4 Hun, 637; 6 Thomp. & C. 685; 66 N. Y. 255.

9 City of Atchison v. Challis, 9 Kan. 603.

10 City of Atchison v. Challis, 9 Kan. 603.

11 City of Atchison v. Challis, 9 Kan. 603; Grant v. Erie, 69 Pa. St. 420; 8 Am. R. 27; Simpson v. Keokuk, 34 Iowa, 568; Eoli v. Indianapolis, 52 Ind. 547; Judge v. Meriden, 38 Conn. 90.

§ 303. **Repair of streets.**—A charter power to "open and extend" streets includes construction as well as laying out.¹ A general power to make, grade, repair, and improve streets is a continuing one, unless the contrary be indicated,² and includes power to grade a street anew;³ and of the necessity or expediency of its exercise, the governing body of the corporation are the judges.⁴ But the power to determine what street improvements shall be made,⁵ or the power to regulate the general grade of the street, cannot be delegated.⁶ A city corporation is not liable for damages, except by statute, for injury to the property of an individual resulting from the exercise by the city authorities, in good faith and with due care, of the lawful corporate power to lay out, grade, or repair streets;⁷ and this is held to be so, even where the grading done was unauthorized.⁸ But as it respects chartered cities or ordinary municipal corporations,⁹ they owe to the public the duty of keeping in good order and condition the streets and public ways lying within their corporate limits,¹⁰ and are liable for injuries to persons and property happening by reason of their neglect to do so.¹¹ And it is immaterial how a public street in a city became such, so far as regards the duty of the city to keep it in safe condition.¹² But the liability of a city for defects in streets does not extend to failure to improve a street not needed for the use of the public;¹³ nor to injuries received from a defect in a highway while using it merely as a playground;¹⁴ nor to defects, though within the highway, which are out of the traveled path, and not so situated as to affect the safety of travelers;¹⁵ nor to an omission to erect barriers merely to prevent travelers from straying from a highway;¹⁶ nor to obstructions which the city is under no obligation to remove, merely because it has tried to remove them.¹⁷ So the liability is limited to the natural consequences of the neglect of duty,¹⁸ and to injuries caused solely by the neglect or defect.¹⁹ If the negligence of the plaintiff materially

contributed to the injury, it is a defense.²⁰ And a recovery of damages for a personal injury, caused by neglect to repair a street, should be limited to a compensation for loss of time and expenses incurred in curing the injury, the pain and suffering caused, and any permanent injury sustained.²¹ To warrant exemplary damages, the negligence of the authorities must be so gross as to be willful, or as indicating actual bad faith.²² The liability of *quasi* corporations, such as counties, townships, etc., for defects in highways, is less stringent,²³ and is generally confined to such penalty as may be expressly imposed for the neglect.²⁴ And in some of the states, incorporated cities are not liable for injuries sustained by private individuals through neglect of the city officers to keep the streets in repair, unless declared to be by their charters.²⁵

1 *Sugar Refining Co. v. Mayor etc.* 26 N. J. Eq. 247.

2 *New Haven v. Sargent*, 38 Conn. 50; 9 Am. R. 360; *Gall v. Cincinnati*, 18 Ohio St. 563.

3 *Karst v. St. Paul etc. R. R. Co.* 22 Minn. 118; *Wistar v. Philadelphia*, 60 Pa. St. 505.

4 *Markham v. Mayor etc.* 23 Ga. 402; *McCormick v. Patchin*, 53 Mo. 33; 14 Am. R. 440.

5 *Hydes v. Joyes*, 4 Bush, 464.

6 *State v. New Brunswick*, 32 N. J. L. 548.

7 *Green v. Reading*, 9 Watts, 382; *Hovey v. Mayo*, 43 Me. 322; *City of Delphi v. Evans*, 36 Ind. 80; 10 Am. R. 12; *Simmons v. Camden*, 26 Ark. 276; *Dore v. Milwaukee*, 42 Wis. 108; *Cheever v. Shedd*, 13 Blatchf. 258; and see *Lee v. Minneapolis*, 22 Minn. 13; *Burlington v. Gilbert*, 31 Iowa, 356; *Detroit v. Beckman*, 34 Mich. 125; *Shaw v. Crocker*, 42 Cal. 435; *City of Quincy v. Jones*, 76 Ill. 231; 20 Am. R. 243; *Mayor etc. v. Willison*, 50 Md. 138; 33 Am. R. 304.

8 *Horn v. Baltimore*, 30 Md. 218.

9 See *Browning v. Springfield*, 17 Ill. 143.

10 *Griffin v. Williamstown*, 6 W. Va. 312; *Sterling v. Thomas*, 60 Ill. 264; *People v. Bloomington*, 63 Id. 207; *Clark v. Lockport*, 49 Barb. 580; *Meares v. Wilmington*, 9 Ired. 73.

11 *Blake v. St. Louis*, 40 Mo. 569; *Dayton v. Pease*, 4 Ohio St. 80; *Parker v. Macon*, 39 Ga. 725; *Albritton v. Huntsville*, 60 Ala. 486; 31 Am. R. 46; *Weed v. Ballston Spa*, 76 N. Y. 329; *Barnes v. Elba*, 32 Wis. 605; *Shurtle v. Minneapolis*, 17 Minn. 308. But see *Navasota v. Peace*, 46 Tex. 525; 26 Am. R. 279.

12 *Phelps v. Mankato*, 23 Minn. 276.

13 *Craig v. Sedalla*, 63 Mo. 417; *City of Henderson v. Sandefur*, 11 Bush, 550; and see *Morgan v. Hallowell*, 57 Me. 375.

14 *Tighe v. Lowell*, 119 Mass. 472; *Lyons v. Brookline*, Id. 491; *Blodgett v. Boston*, 8 Allen, 237; and see *Chicago v. Starr*, 42 Ill. 174.

15 *Wheeler v. Westport*, 30 Wis. 392; *Perkins v. Fayette*, 68 Me. 132; 28 Am. R. 84. See *Blake v. Newfield*, 68 Me. 365; *City of Atlanta v. Wilson*, 59 Ga. 644; 27 Am. R. 336.

16 *Puffer v. Inhabitants of Orange*, 122 Mass. 399; *Sykes v. Pawlet*, 43 Vt. 446; 5 Am. R. 235; *Chapman v. Cook*, 10 R. I. 304; 14 Am. R. 686. But barriers or railings must be erected and maintained at places where necessary to render traveling on the highway safe: *Woods v. Groton*, 111 Mass. 357; *Ward v. North Haven*, 43 Conn. 148. And their necessity is a question of fact for the jury: *Houfe v. Town of Fulton*, 29 Wis. 296; 9 Am. R. 568.

17 *Goodrich v. Chicago*, 4 Biss. 18; and see *Scott v. Des Moines*, 34 Iowa, 552.

18 *Nichols v. Athens*, 66 Me. 402; *Smith v. Leavenworth*, 15 Kan. 81.

19 *Howe v. Lowell*, 101 Mass. 99; *Shepherd v. Chelsea*, 4 Allen. 113.

20 *Covington v. Bryant*, 7 Bush, 248; *Durkin v. Troy*, 61 Barb. 437; *Lovenguth v. Bloomington*, 71 Ill. 238.

21 *Jacksonville v. Lambert*, 62 Ill. 519; *Weisenberg v. Appleton*, 26 Wis. 56.

22 *Chicago v. Kelly*, 69 Ill. 475; *Jacksonville v. Lambert*, 62 Id. 519.

23 *Soper v. Henry County*, 26 Iowa, 264; *Hamilton County v. Mighels*, 7 Ohio St. 109; *Treadwell v. Comm'rs*, 11 Id. 190.

24 *Walsham v. Kemper*, 55 Ill. 346; 8 Am. R. 652; *Bussell v. Town of Steuben*, 57 Ill. 35; *Pray v. Jersey City*, 32 N. J. L. 394; *Granger v. Pulaski County*, 26 Ark. 37; *Braham v. Supervisors*, 54 Miss. 363; 28 Am. R. 352; *Elkenberry v. Township of Bazaar*, 22 Kan. 556; 31 Am. R. 198.

25 *Winbigler v. Los Angeles*, 45 Cal. 36; and see *Detroit v. Blackeby*, 21 Mich. 84; 4 Am. R. 450; *Pray v. Jersey City*, 32 N. J. L. 394.

§ 304. Injuries from defective sidewalks.—The duty of a municipal corporation to keep its ways in repair, and maintain them free from defects or obstructions, extends to sidewalks;¹ and a city is liable in damages for an injury resulting from a defective sidewalk,² although it was constructed without authority from the city.³ And the fact that the plaintiff was at the time intoxicated will not preclude a recovery for the injury, unless such intoxication contributed thereto.⁴ A city is, however, only required to keep its sidewalks reasonably safe for persons exercising ordinary care and caution.⁵ In the New England states, the liability of towns and cities for injuries resulting from defective streets or sidewalks is wholly statutory;⁶ and it is there held, that a town or city is not liable to one injured by a falling sign suspended over the sidewalk.⁷

¹ *Reinhard v. Mayor etc.* ² *Daly*, 249; *Higert v. Greencastle*, 43 Ind. 574; *Furnell v. St. Paul*, 20 Minn. 117; *Manchester v. Hartford*, 30 Conn. 118; *Hubbard v. Concord*, 35 N. H. 52.

2 *Durant v. Palmer*, 29 N. J. L. 544; *Cusick v. Norwich*, 40 Conn. 375; *Omaha v. Olmstead*, 5 Neb. 446; *Weare v. Fitchburg*, 110 Mass. 334.

3 *Higert v. Greencastle*, 43 Ind. 574. See *Boucher v. New Haven*, 40 Conn. 457.

4 *Healy v. Mayor etc.* 6 Thomp. & C. 92; 3 Hun. 708; and compare *Alger v. Lowell*, 3 Allen, 402; *Stuart v. Machias Port*, 48 Me. 477.

5 *Chicago v. McGiven*, 78 Ill. 347. As to what is reasonable care in removing ice and snow from sidewalks: See *McLaughlin v. Corry*, 77 Pa. St. 101; 18 Am. R. 432; *Collins v. Council Bluffs*, 32 Iowa, 324; 7 Am. R. 200; *Todd v. City of Troy*, 61 N. Y. 506; 61 Barb. 580; *Cook v. Milwaukee*, 24 Wis. 270; 1 Am. R. 183; *Savage v. Bangor*, 40 Me. 176.

6 *Reed v. Belfast*, 20 Me. 248; *Chidsey v. Canton*, 17 Conn. 475; *State v. Burlington*, 36 Vt. 521; *Eastman v. Meredith*, 36 N. H. 284; *Hixon v. Lowell*, 13 Gray, 59; *Oliver v. Worcester*, 102 Mass. 489; *Cromarty v. Boston*, 127 Mass. 329; 34 Am. R. 381.

7 *Jones v. Boston*, 104 Mass. 75; 6 Am. R. 194; and see *Taylor v. Peckham*, 8 R. I. 349; 5 Am. R. 578; *Hewison v. New Haven*, 37 Conn. 475; 9 Am. R. 342. But compare *Grove v. Fort Wayne*, 43 Ind. 429; 15 Am. R. 263.

§ 305. *Liability as affected by notice.*—The liability of a city for an injury caused by a defect in a public street or sidewalk extends only to a defect of which the city has had actual notice,¹ or which has existed long enough or notably enough for notice to be reasonably inferred.² But the rule as to notice has no application to a case where the ignorance of the defect is the result of a clear and unmistakable omission.³ If the exercise of a proper supervision would have led to the discovery of a defect in season to repair it or to protect the public against it, there is the same liability for an injury caused by the defect as if there had been actual knowledge of it.⁴ But where cities and towns are under no obligation to light highways,⁵ mere notice to a lamp-lighter of a defect in a sidewalk does not warrant a finding that the city had notice thereof.⁶

1 *Donlon v. Clinton*, 33 Iowa, 397; *Jansen v. City of Atchison*, 16 Kan. 358; *Fort Wayne v. DeWitt*, 47 Ind. 391.

2 *Dewey v. Detroit*, 15 Mich. 307; *Moore v. Minneapolis*, 19 Minn. 300; *Hall v. Manchester*, 40 N. H. 410; *Ward v. Jefferson*, 24 Wis. 342; *Fahey v. Howard*, 62 Ill. 28; *Atchison v. King*, 9 Kan. 550; *Chicago v. McCarthy*, 75 Ill. 602; *Todd v. City of Troy*, 61 N. Y. 506; and see *Seaman v. Mayor etc.* 3 Daly, 147; *Schweickhardt v. St. Louis*, 2 Mo. App. 571.

3 *Boucher v. New Haven*, 40 Conn. 457; and see *Alexander v. Mt. Sterling*, 71 Ill. 368.

4 *Cusick v. Norwich*, 40 Conn. 375; and see *Mayor etc. v. Perdue*, 53 Ga. 607; *McCarthy v. Syracuse*, 46 N. Y. 194; *Rosenberg v. Des Moines*, 41 Iowa, 416; *Market v. St. Louis*, 56 Mo. 189.

5 See *Randall v. Eastern R. R. Co.* 106 Mass. 276; *City of Freeport v. Isbell*, 83 Ill. 440; 25 Am. R. 407.

6 *Monies v. Lynn*, 119 Mass. 273. A city is not liable for injuries caused by the fall of a public market-house, caused by a cyclone: *Flori v. St. Louis*, 69 Mo. 341; 33 Am. R. 504.

§ 306. **Excavations and obstructions.**—Where streets are used for the deposit of building materials by adjoining proprietors, or are dug up for the construction of sewers, the laying of water or gas pipes, or for other improvements by the corporation or by the adjoining owner, it is the duty of the corporation to see that proper guards, or lights by night, are erected and maintained around such excavations or obstructions, so that travelers be not exposed to injury;¹ and for a neglect of this duty, whereby a person is injured, the corporation is liable.² And its liability is not varied by the consideration that it has or has not contracted with the persons doing the work to adopt such precautions.³ So if cellar doors opening out on the sidewalk are negligently kept or left open,⁴ or a hole in a street has been permitted to remain after attention of the proper officers has been called to the defect, the corporation is liable to a person injured thereby.⁵ But where the corporation has been compelled to pay damages for a defect in a street or sidewalk, for which it became legally liable through the wrongful act of an individual, it may recover reimbursement from him.⁶

1 *Storrs v. Utica*, 17 N. Y. 104; *Chicago v. McGiven*, 78 Ill. 347; *Cusick v. Norwich*, 40 Conn. 375; *Covington v. Bryant*, 7 Bush, 248; *Mayor etc. v. Dodd*, 58 Ga. 238; *Wendell v. Mayor etc.* 4 Abb. N. Y. App. 563; and see *King v. N. Y. Cent. etc. R. R. Co.* 66 N. Y. 181.

2 *Cusick v. Norwich*, 40 Conn. 375; *Seneca Falls v. Zalinski*, 8 Hun, 571; *Mayor etc. v. Cooley*, 55 Ga. 17.

3 *Storrs v. Utica*, 17 N. Y. 104; *Springfield v. Le Claire*, 49 Ill. 476; and compare *Sewall v. St. Paul*, 20 Minn. 511; *Chicago v. Joney*, 60 Ill. 383; *King v. N. Y. Cent. etc. R. R. Co.* 66 N. Y. 181; *Chicago v. Dermody*, 61 Ill. 431; *City of Joliet v. Harwood*, 86 Ill. 110; 29 Am. R. 17; *City of Erie v. Caulkins*, 85 Pa. St. 247; 27 Am. R. 642.

4 *Smith v. Leavenworth*, 15 Kan. 81; *Chapman v. Mayor etc.* 55 Ga. 566; and see *Niblett v. Nashville*, 12 Helsk. 684; 27 Am. R. 755.

5 *Case v. City of Naverly*, 36 Iowa, 545; and see *Fort Wayne v. De Witt*, 47 Ind. 391; *Bassett v. St. Joseph*, 53 Mo. 290; 14 Am. R. 446; *Davenport v. Ruckman*, 16 Abb. Pr. 341; 10 Bosw. 20.

6 *Seneca Falls v. Zallinski*, 8 Hun, 571; *Severin v. Eddy*, 52 Ill. 189; and see *Centerville v. Woods*, 57 Ind. 192; *Chicago v. Robbins*, 2 Black, 418; 4 Wall. 657; *Fahey v. Harvard*, 63 Ill. 28.

§ 307. **Damage by fires.**—Municipal authority, either by express grant or by virtue of the power to make police regulations or needful by-laws, usually extends to the adoption of means to prevent damage by fire.¹ And under an authority to provide for the safety of its inhabitants, a municipal corporation may establish fire limits, and prevent the erection of wooden buildings therein.² But the power to organize and regulate a fire department being in its nature legislative or judicial, a failure of the corporate authorities to exercise the power does not render the corporation liable to an action therefor.³ Nor is it liable to the owner of property consumed by fire, for the reason that it failed to keep cisterns filled with water, firehooks, etc., in repair, whereby the fire might have been extinguished before communicating with such owner's property.⁴ Nor is it liable for the destruction of a building torn down to arrest the progress of a fire, unless such liability is created by statute;⁵ nor, in the absence of express statute, is it liable for injuries caused by the negligence of a fireman while engaged in the discharge of his duties;⁶ nor for damages by a voluntary fire association while engaged in extinguishing a fire within the corporate limits.⁷

1 See *Robinson v. St. Louis*, 28 Mo. 488; *Van Sicklen v. Burlington*, 27 Vt. 79; *Wadleigh v. Gillman*, 12 Me. 403; *Vanderbilt v. Adams*, 7 Cowen, 349.

2 *Vanderbilt v. Adams*, 7 Cowen, 349; *Mayor etc. v. Hoffman*, 29 La. An. 651; 29 Am. R. 345; *Mayor etc. v. Thorne*, 7 Paige, 261; *Brady v. Insurance Co.* 11 Mich. 425; and see *Aldrich v. Howard*, 7 R. 1. 199; *Brown v. Hunn*, 27 Conn. 332; *City of Troy v. Whittiers*, 2 Hun, 63; 4 Thomp. & C. 256; *Salem v. Maynes*, 123 Mass. 372.

3 *Heller v. Sedalla*, 53 Mo. 159; 14 Am. R. 444; *Grant v. City of Erie*, 69 Pa. St. 420; 8 Am. R. 272; *Wheeler v. Cincinnati*, 19 Ohio St. 19; 3 Am. R. 363; *Brinkmeyer v. Evansville*, 29 Ind. 187; *Hafford v. New Bedford*, 16 Gray, 297.

4 *Patch v. Covington*, 17 Mon. B. 722; *Wheeler v. Cincinnati*, 19 Ohio St. 19; 2 Am. R. 363; *Jewett v. New Haven*, 33 Conn. 368; 9 Am. R. 382.

5 *McDonald v. Red Wing*, 13 Minn. 38; *Keller v. Corpus Christie*, 80 Tex. 614; 32 Am. R. 613; *Correas v. San Francisco*, 1 Cal. 452. See

also *Field v. Des Moines*, 39 Iowa, 575; 18 Am. R. 46; *Mayor etc. v. Lord*, 18 Wend, 126; *People v. Buffalo*, 76 N. Y. 553; 32 Am. R. 337. But see *Dawson v. Kultner*, 48 Ga. 133.

6 *Jewett v. New Haven*, 38 Conn. 366; 9 Am. R. 362; *Howard v. San Francisco*, 81 Cal. 52; *Fisher v. Boston*, 104 Mass. 87; 6 Am. R. 196; and see *Hayes v. Oshkosh*, 33 Wis. 310; 14 Am. R. 76a; *Greenwood v. Louisville*, 13 Bush, 226; 26 Am. R. 263.

7 *Torbush v. Norwich*, 38 Conn. 225; 9 Am. R. 236.

§ 308. Injuries by mob.—Municipal corporations are not liable at common law for damage to property done by mobs or riotous assemblages;¹ nor for injuries caused by the failure of its officers to repress a mob.² But the legislature may provide a remedy applicable to such cases, and may regulate the mode of assessing damages.³

1 *Western College v. Cleveland*, 12 Ohio St. 375; *Prather v. Lexington*, 13 Mon. R. 558; *Mayor etc. v. Poultney*, 25 Md. 107; *Dale County v. Gunther*, 46 Ala. 118; *County of Allegheny v. Gibson*, 90 Pa. St. 397; 25 Am. R. 670.

2 *Prather v. Lexington*, 13 Mon. R. 559; *Hart v. Bridgeport*, 13 Blatchf. 289; *Campbell v. City of Montgomery*, 53 Ala. 527; 25 Am. R. 656.

3 See *Luke v. Brooklyn*, 43 Barb. 54; *Saries v. Mayor etc.*, 47 Id. 447; *Loomis v. Supervisors*, 6 Lans. 268; *Palmer v. Concord*, 48 N. H. 211; *Brightman v. Bristol*, 65 Me. 428; *Wing Chung v. Los Angeles*, 47 Cal. 531; *Duffy v. Baltimore*, Taney, 200; *Atchison v. Twine*, 9 Kan. 350; *In re Pennsylvania Hall*, 5 Pa. St. 204; *Solomon v. City of Kingston*, 24 Hun, 563.

§ 309. Officers—election or appointment of.—In this country, provision is usually made in the charter of a municipal corporation as to all the principal officers thereof.¹ And where such is clearly the legislative intent, the corporation cannot, by virtue of any inherent or implied power, create another office, appoint an incumbent, and clothe him with the powers of a municipal officer.² The provisions of the charter as to the time and mode of election or appointment of officers must also be observed;³ the powers of the corporation, in this respect, being merely such as the charter affirmatively gives.⁴ If the charter provides that the mayor shall be elected, a vacancy occurring in the office of mayor cannot be filled by appointment by the governor of the state, under a

statute authority to fill vacancies in municipal offices.⁵ But a city council having authority to elect certain officers may appoint them by resolution, if no mode of election is prescribed.⁶ And a constitutional provision that county and township officers shall be elective does not necessarily imply that city and village officers must be elected.⁷ A charter provision that the common council of a city shall "judge of the qualifications, elections, and returns of their own members," has been held to oust the courts of jurisdiction to inquire into those questions.⁸ But the contrary has likewise been held.⁹ A municipal corporation is not dissolved by the mere failure to elect officers,¹⁰ while the capacity to elect remains.¹¹ Failure to hold an election on the law day does not destroy the right to hold an election later;¹² the previous incumbents hold over, and may lawfully exercise the functions of their office, until their successors are elected.¹³ The power which a board of supervisors exercise in conferring title to an office is that of appointment and not of election;¹⁴ and it is within the power of the board to revoke an appointment made by it, at any time before the commission or certificate is issued to the person appointed.¹⁵ Acceptance of the resignation of a municipal officer by the proper authorities is not necessary to render the resignation effective, unless required by statute.¹⁶

1 See *State v. Von Baumbach*, 12 Wis. 310; *White v. Tallman*, 2 Dutch. 67.

2 *Hoboken v. Harrison*, 30 N. J. L. 73. Compare *Field v. Girard College*, 54 Pa. St. 233; *People v. Redell*, 2 Hill. 198. A charter power to create an office by ordinance includes power to abolish the office: *Waldraven v. Memphis*, 4 Cold. 431; *Augusta v. Sweeny*, 44 Ga. 463; 9 Am. R. 172. But compare *Caulfield v. State*, 1 So. Car. 461.

3 *Vason v. Augusta*, 38 Ga. 542; *Stadler v. Detroit*, 13 Mich. 346; and see *Rex v. Chitty*, 5 Ad. & E. 609; *Rex v. Mayor etc.* 7 Mod. 373.

4 *People v. Ransom*, 56 Barb. 514.

5 *Mayor etc. v. Hoffman*, 29 La. An. 651.

6 *Low v. Commissioners etc. Charlt. R. M.* 302; see *Russell v. Chicago*, 22 Ill. 235; *Commonw. v. Pittsburg*, 14 Pa. St. 177.

7 *State v. Covington*, 29 Ohio St. 102.

8 *People v. Metsker*, 47 Cal. 524; and see *Selleck v. South Norwalk*, 60 Conn. 359; *Peabody v. School Committee*, 115 Mass. 383; *State v. Marlow*, 15 Ohio St. 114.

9 *State v. Fitzgerald*, 44 Mo. 425; *People v. Hall*, 80 N. Y. 117; and see *Burginshofen v. Martin*, 2 Rawle, 389; *Wammack v. Holloway*, 2 Ala. 31; *McVeany v. Mayor*, 80 N. Y. 185.

10 *Welch v. Str. Genevieve*, 1 Dill. 130; and see *Colchester v. Brooke*, 7 Q. B. 383.

11 *Clarke v. Rochester*, 5 Abb. Pr. 107; *President v. Thompson*, 20 Ill. 187; *Phillips v. Wickham*, 1 Paige, 500. Compare *Barkley v. Levee Commissioners*, 93 U. S. 258.

12 *Commissioners v. McDaniel*, 7 Jones, 107; *Tharin v. Seabrook*, 6 Rich. 113; *Coles County v. Allison*, 23 Ill. 437.

13 *People v. Fairbury*, 51 Ill. 149. Compare *Barkley v. Levee Commissioners*, 93 U. S. 258.

14 *Conger v. Gilmer*, 32 Cal. 75.

15 *Conger v. Gilmer*, 32 Cal. 75. And compare *Pratt v. Luther*, 45 Ind. 246.

16 *State v. Mayor etc.* 4 Neb. 298.

§ 310. Powers and duties of officers.—Municipal officers can only exercise such powers as are conferred upon them by legislative authority, either expressly or by fair implication;¹ and they must follow strictly the provisions of the statute conferring their powers.² So persons dealing with such officers must ascertain, at their peril, that they are acting within the scope of the powers conferred.³ Powers and duties involving discretion, conferred by law upon specific officers, must be personally exercised;⁴ and cannot be by them delegated to other officers, unless the statute expressly permits it.⁵ And municipal officers cannot act as such so as to bind the municipality in respect to matters in which they are personally interested.⁶ The duties of the mayor are properly executive and administrative;⁷ and he has no jurisdiction, unless it be expressly conferred, to try civil causes.⁸ But although not vested with any distinct judicial functions, he may cause the arrest of and impose fines upon disorderly persons;⁹ and he has a summary jurisdiction to fine those who obstruct the public way.¹⁰ Neither the mayor nor the city solicitor have authority to employ counsel in behalf of the city, unless such authority is expressly conferred.¹¹ The police officers of a city may be authorized by the city council to arrest upon view, and without warrant, persons violating city ordinances;¹²

provided such a course is not repugnant to the general law or policy of the state.¹²

1 Glass v. Ashbury, 49 Cal. 571; Hopple v. Brown, 13 Ohio St. 311; Sherlock v. Winnetka, 68 Ill. 530; Carron v. Martin, 2 Dutch. 594.

2 Glass v. Ashbury, 49 Cal. 571; and see Clay v. Wright, 44 Vt. 538; Moser v. White, 29 Mich. 59; Geary v. City of Kansas, 61 Mo. 378.

3 Cheeney v. Town of Brookfield, 60 Mo. 53; Davies v. Mayor, 13 Jones & S. 373; McDonald v. Mayor etc. 68 N. Y. 23; 23 Am. R. 144. Compare Cook v. Deerfield, 64 Pa. St. 445; Doering v. State, 49 Ind. 56; Kobs v. Minneapolis, 22 Minn. 169; Bladen v. Philadelphia, 60 Pa. St. 464; Westerfield v. Radde, 7 Daly, 326.

4 Richardson v. Heydenfeldt, 46 Cal. 68; Stockton v. Creanor, 45 Cal. 643; and see Board of Excise v. Sackrider, 35 N. Y. 154.

5 Richardson v. Heydenfeldt, 46 Cal. 68; State v. Paterson, 34 N. J. L. 163. See also, City of Troy v. Winters, 2 Hun. 63; St. Louis v. Clemens, 43 Mo. 385; East St. Louis v. Wehrung, 50 Ill. 28; Hydes v. Joyes, 4 Bush, 464; Thompson v. Schermerhorn, 6 N. Y. 92.

6 Judevine v. Hardwick, 49 Vt. 180; San Diego v. San Diego etc. R. Co. 44 Cal. 106; Manley v. Atchison, 9 Kan. 358; Richards v. Columbia, 55 N. H. 86.

7 See Muscatine v. Steck, 7 Iowa, 505; Gulick v. New, 14 Ind. 93; Nichols v. Boston, 26 Mass. 39; Achley's Case, 4 Abb. Pr. 35; Ela v. Smith, 5 Gray, 121.

8 Smith v. Deweese, 41 Tex. 594. See Prell v. McDonald, 7 Kan. 426; 12 Am. R. 423; Howard v. Shoemaker, 35 Ind. 111.

9 Shafer v. Mumma, 17 Md. 331; Smith v. Hutchinson, 8 Rich. 260; Pedrick v. Bailey, 12 Gray, 161.

10 Warwick v. Mayo, 15 Gratt. 528. See Green v. Talbot, 36 Iowa, 499.

11 Fletcher v. Lowell, 15 Gray, 103; City of Bryan v. Page, 51 Tex. 532; 32 Am. R. 637.

12 Prell v. McDonald, 7 Kan. 426; 12 Am. R. 423; Taylor v. Strong, 3 Wend. 384; Butolph v. Blust, 5 Lans. 34; 41 How. Pr. 481; Thomas v. Ashland, 12 Ohio St. 124; City Council v. Payne, 2 Nott & McC. 475. See Harft v. McDonald, 1 City Court R. (N. Y.) 181.

13 State v. Lafferty, 5 Har. (Del.) 491; Low v. Evans, 16 Ind. 486; White v. Kent, 11 Ohio St. 550; Pesterfield v. Vickers, 3 Cold. 205.

§ 311. **Liabilities of officers.**—Officers of a municipal corporation are not liable, either civilly or criminally, for acts done in a judicial or quasi judicial capacity,¹ and within the scope of their authority,² in the absence of fraud, or malice, or a statute imposing the liability.³ But where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct.⁴ Thus, county supervisors are personally liable to pay a judgment against the municipality for failing to levy a tax

which they had power to levy, to pay such judgment.⁵ And a public officer may likewise be held personally liable for injuries resulting from the improper execution of official duties,⁶ not judicial in their nature.⁷ And the fact, that the law makes a civil corporation liable "for the illegal doings and defaults" of its officers, does not deprive the party injured of his right to proceed personally against the officer who committed the injury.⁸ As it respects money that comes into the hands of a municipal officer, by virtue of his office, he is liable to account for it and pay it over, whether stolen without his fault, or whatever may have become of it,⁹ unless relieved from this responsibility by statute.¹⁰ But, public officers cannot be held liable for the misconduct and malfeasance of persons they are obliged to employ;¹¹ having no freedom of choice in the selection of agents, the maxim *respondet superior* cannot be applied.¹² Nor are municipal officers personally liable on contracts made within the scope of their authority, unless the intent to bind themselves personally is very apparent;¹³ nor are they personally liable, merely because they transcended their authority, in cases where the other contracting party knew at the time that the contract was in excess of such authority.¹⁴

1 See *Wilkes v. Duman*, 7 How. 89; *Bartlett v. Crozier*, 17 Johns. 439; *Township v. Carey*, 3 Dutch. 377; *Bakers v. State*, 27 Ind. 495; *Ramsey v. Riley*, 13 Ohio, 157; *Borough of Freeport v. Marks*, 59 Pa. St. 253.

2 *State v. Dunnington*, 12 Md. 340; *Craig v. Burnett*, 32 Ala. 738; *Waldron v. Berry*, 51 N. H. 137. When officers of a municipal corporation are vested with legislative powers, they are exempt from personal liability for the mistaken use of such powers, if within their authority, and if they exceed their powers, their acts are void, and consequently do not impose personal liability: *Jones v. Loving*, 55 Miss. 109; 30 Am. R. 508. Compare *Newman v. Sylvester*, 42 Ind. 106; *Green v. Talbot*, 36 Iowa, 499.

3 *Waldron v. Berry*, 51 N. H. 136; *Walker v. Hallock*, 32 Ind. 239; *Johnson v. Stanley*, 1 Root, 245; *Stewart v. Southard*, 17 Ohio, 402.

4 *Amy v. Supervisors*, 11 Wall. 136; *Clark v. Miller*, 54 N. Y. 523; *Nowell v. Wright*, 3 Allen, 166.

5 *Amy v. Supervisors*, 11 Wall. 136; *Porter v. Thomson*, 22 Iowa, 391; *Oswald v. Thedinga*, 17 id. 13. Compare *People v. East Saginaw*, 23 Mich. 164.

6 *Nowell v. Wright*, 3 Allen, 166; *Weaver v. Devendorf*, 3 Denio, 117.

7 *Hover v. Barkhoof*, 44 N. Y. 113; *Griffith v. Follett*, 20 Barb. 620, 630.

8 *Bounds v. Mansfield*, 38 Me. 586.

9 *Rock v. Stinger*, 36 Ind. 346; *Township of Union v. Smith*, 39 Iowa, 9; 18 Am. R. 39; *Lowry v. Polk Co.* 51 Iowa, 50; 33 Am. R. 114; *State v. Powell*, 67 Mo. 935; 29 Am. R. 512. Compare *State v. Parker*, 33 Id. 285; *Inhabitants etc. v. Pearson*, 61 Me. 552. But see *Cumberland v. Pennell*, 69 Me. 357; 31 Am. R. 284.

10 *Halbert v. State*, 22 Ind. 125; *State v. Harper*, 6 Ohio St. 607.

11 *Pritchard v. Keefer*, 53 Ill. 117; *Mayor etc. v. Furze*, 3 Hill, 612; *Humphreys v. Mears*, 1 Man. & R. 187.

12 *Bailey v. Mayor etc.* 3 Hill, 531; 2 Denio, 433; *Bolton v. Crowther*, 3 Dowl. & R. 195.

13 *Hodgson v. Dexter*, 1 Cranch C. C. 345; *Nickerson v. Dyer*, 105 Mass. 320; *Olney v. Wickes*, 18 Johns. 122; *Brown v. Rundlett*, 15 N. H. 360; *Ogden v. Raymond*, 22 Conn. 379.

14 *Leet v. Shedd*, 42 Vt. 277. Compare *Stone v. Higgins*, 28 Vt. 617; *Dameron v. Irwin*, 8 Ired. 421; *Boardman v. Hayne*, 29 Iowa, 339; *Hall v. Cockrell*, 28 Ala. 507.

§ 312. Compensation of officers and agents.—

An officer of a municipal corporation cannot maintain an action for official services for which no compensation has been provided, either by law, or by express contract or vote of the corporation;¹ nor is the corporation liable for services rendered by an officer under an unconstitutional statute.² But it may become liable to pay for services rendered in its behalf by an agent, without either a sealed contract or a resolution in writing employing an agent.³ And where a municipal corporation has the power to employ an officer or agent, and fix his compensation, and it does employ him, but neglects to fix his compensation, he may recover on a *quantum meruit*.⁴ It is competent for the municipal authorities to change the compensation of officers, from time to time, during the continuance of their term of office,⁵ unless the services to be performed are professional and private, rather than public or official;⁶ in which case, the employment will be deemed a contract,⁷ which the corporation has no right to impair.⁸ But an increase of an officer's duties, made by the city council, does not imply any obligation to increase his salary;⁹ nor will the promise of a committee or individual members of the corporation to pay extra compensation be binding on the corporation.¹⁰ But for services rendered by request, relative to matters which the officer

was under no obligation to attend to, he is entitled to a reasonable extra compensation.¹¹ And it is no defense to an action by an employee of a municipal corporation for his salary, that absences from his post were numerous, provided they did not interfere with the faithful discharge of his duties.¹² But an officer cannot recover the compensation attached to an office during the period of his suspension therefrom, by competent authority, upon well-founded charges of misconduct.¹³ But if charges made by order of a city government against its agents prove to be groundless, the city may reimburse to them their expenses in defending the charges;¹⁴ and it may indemnify an executive officer for the expenses of a judgment against him for acts committed in good faith in the discharge of his official duty.¹⁵ Where a municipal corporation has once paid the compensation attached to an office to an officer *de facto*, whose right to the office has not been determined against him, it is protected from a second payment;¹⁶ but after such determination against him by a competent tribunal, any amount of compensation for services rendered, not paid to the intruder, is due and payable to one adjudged to be the officer *de jure*, and may be recovered by the latter of the municipality.¹⁷

1 *Garnier v. St. Louis*, 37 Mo. 554; *Sikes v. Hatfield*, 13 Gray, 347; *Farnsworth v. Inhabitants etc.* 122 Mass. 268; *Locke v. City of Central*, 4 Colo. 65; 34 Am. R. 66; and see *McClung v. St. Paul*, 14 Minn. 420; *Bladen v. Philadelphia*, 60 Pa. St. 464; *State v. Brewer*, 59 Ala. 130.

2 *Meagher v. County of Story*, 5 Nev. 244.

3 *New Athens v. Thomas*, 82 Ill. 259; *Selma v. Mullen*, 46 Ala. 411.

4 *Tucker v. Mayor etc.* 4 Nev. 20; and see *Kinnie v. Waverly*, 43 Iowa, 486; *Preble v. Bangor*, 64 Me. 115.

5 *Commonw. v. Bacon*, 6 Serg. & R. 322; *Iowa City v. Foster*, 10 Iowa, 189; *Alexander v. McKenzie*, 2 So. Car. 81. Compare *People v. Auditors etc.* 13 Mich. 233.

6 See *Chase v. Lowell*, 7 Gray, 33; *Kimball v. Salem*, 111 Mass. 87.

7 *Chase v. Lowell*, 7 Gray, 33.

8 See *Caverley v. Lowell*, 1 Allen, 289; *Cox v. Burlington*, 43 Iowa, 612.

9 *Wendell v. Brooklyn*, 29 Barb. 204; *Detroit v. Redfield*, 19 Mich. 376; *Covington v. Mayberry*, 9 Bush, 304; *Cowan v. Mayor etc.* 3 Hun. 632; *Oakley v. Mayor etc.* 4 Id. 72.

10 *Evans v. Trenton*, 4 Zab. 764; and see *Debolt v. Cincinnati*, 7 Ohio St. 237; *Hatch v. Mann*, 15 Wend. 44; *Gilmore v. Lewis*, 13 Ohio,

281; *Heslep v. Sacramento*, 2 Cal. 580; *Preston v. Bacon*, 4 Conn. 471; *Mayor of Niles v. Muzzy*, 33 Mich. 61; 20 Am. R. 670.

11 *Calais v. Whidden*, 64 Me. 249; *Converse v. United States*, 21 How. 463; *Evans v. Trenton*, 4 Zab. 764.

12 *Whitney v. Mayor etc.* 7 Jones & S. 106.

13 *Wesberg v. Kansas*, 64 Mo. 493. Compare *Shaw v. Mayor etc.* 19 Ga. 468; *Stadler v. Detroit*, 13 Mich. 346.

14 *Lawrence v. McAlvin*, 109 Mass. 311. See *Hoboken v. Gear*, 3 Dutch. 265; *Mayor etc. v. Shaw*, 25 Ga. 590.

15 *Sherman v. Carr*, 8 R. I. 43; *Gregory v. Bridgeport*, 41 Conn. 76; 19 Am. R. 435; *Hasdell v. Hancock*, 3 Gray, 526; *Pike v. Middleton*, 12 N. H. 278; *Fuller v. Groton*, 11 Gray, 340. Compare *Halstead v. Mayor etc.* 3 N. Y. 430; *State v. Council*, 9 Vroom, 430; 20 Am. R. 404.

16 *McVeany v. Mayor etc.* 80 N. Y. 185; and see *Smith v. New York*, 37 Id. 518; *Benvit v. Wayne County*, 20 Mich. 176. That the salary is incident to the title to the office, and not to its occupancy and exercise: see *Carroll v. Siebenthaler*, 37 Cal. 193; *Dorsey v. Smyth*, 28 Id. 21; *Meagher v. County*, 5 Nev. 244.

17 *McVeany v. Mayor etc.* 80 N. Y. 185. Compare *City v. Given*, 60 Pa. St. 136; *People v. Miller*, 24 Mich. 458; *Dorsey v. Smyth*, 28 Cal. 21; *United States v. Addison*, 6 Wall. 291; *Queen v. Governors etc.* 8 Ad. & E. 682; *Ex parte Ramshay*, 83 Eng. Com. L. 174; *Matthews v. Supervisors etc.* 53 Miss. 715; 24 Am. R. 715.

§ 313. Remedies by and against.—Municipal corporations may sue and be sued in all courts, in like cases as private corporations or natural persons.¹ They are liable to actions upon contract and in tort;² and as a general rule, when a good cause of action exists against a municipal corporation, it may be prosecuted by an action in whatever form would be appropriate against an individual.³ In practice, courts of law are deemed to be the proper tribunals to review the irregularities or errors in the acts or proceedings of such corporations;⁴ but in special cases, equity will entertain jurisdiction for like purposes.⁵ A municipal corporation is liable to proceedings by dispossession for non-payment of rent;⁶ but is not liable to process of garnishment;⁷ and moneys in the hands of an officer of a municipal corporation, held by him in virtue of his office, are not subject to garnishment.⁸ Nor can the taxes and public revenues of such corporations be seized under execution against them;⁹ though it is otherwise as it respects property owned by them as an investment of funds merely.¹⁰ Where a city charter provides that no action shall be maintained against the city,

until a demand of satisfaction of the board of trustees, such demand and a refusal of satisfaction must be averred by the plaintiff in such an action.¹¹

1 See *Davis v. Mayor etc.* 1 Duer, 451; 9 N. Y. 263; S. C. again, 2 Duer, 663; § 46, *ante*.

2 See *McCracken v. San Francisco*, 16 Cal. 591; *Lincoln v. Worcester*, 8 Cush. 55; *Bennett v. Buffalo*, 17 N. Y. 383; *Richmond v. Long*, 17 Gratt. 375; *Green v. Mayor etc.* 5 Abb. Pr. 503; 8 id. 25; *Taylor v. Mayor etc.* 82 N. Y. 10.

3 *Winslow v. Perquimans County*, 64 No. Car. 218; and see *Herzo v. San Francisco*, 33 Cal. 134; *Lemington v. Blodgett*, 37 Vt. 215.

4 *Heywood v. Buffalo*, 14 N. Y. 534; *State v. Jersey City*, 1 Vroom, 521; *Intendant v. Pippin*, 31 Ala. 542; *Hannewinkle v. Georgetown*, 15 Wall. 547; *Oakland v. Carpenter*, 13 Cal. 540.

5 *Bond v. Newark*, 19 N. J. Eq. 376; *Dows v. Chicago*, 11 Wall. 108; *Whiting v. Boston*, 106 Mass. 89; and compare *People v. Ingersoll*, 55 N. Y. 1; 17 Am. R. 178; *People v. Fields*, 50 How. Pr. 481; *Tift v. Buffalo*, 65 Barb. 469; *Phelps v. Watertown*, 61 id. 121; tit. INJUNCTION. As to remedy by mandamus: see tit. MANDAMUS; by *certiorari*: *Ewing v. St. Louis*, 5 Wall. 413; *Whiting v. Boston*, 106 Mass. 89; *St. Paul v. Marvin*, 16 Minn. 192; *Cunningham v. Squires*, 2 W. Va. 422; *State v. Dowling*, 50 Mo. 134; *People v. Ogdensburg*, 48 N. Y. 390; *State v. Donahay*, 1 Vroom, 404; *Mayor etc. v. Shaw*, 16 Ga. 172; *Carroll v. Mayor etc.* 12 Ala. 173; by writ of prohibition: *Zylstra v. Charleston*, 1 Bay, 382; *Warwick v. Mayo*, 15 Gratt. 528; *Clayton v. Heidelberg*, 9 Smedes & M. 623; by indictment: *State v. Mayor etc.* 11 Humph. 217; *Commonw. v. Hopkinsville*, 7 Mon. B. 38; *Davis v. Bangor*, 42 Me. 522; *Brace v. Bangor*, 51 id. 532; *State v. Hudson County*, 1 Vroom, 137; *Phillips v. Commonw.* 44 Pa. St. 197; *State v. Dover*, 46 N. H. 432.

6 *Brown v. Mayor etc.* 66 N. Y. 335.

7 *Hawthorn v. St. Louis*, 11 Mo. 53; *Merwin v. Chicago*, 45 Ill. 113; *Baltimore v. Root*, 8 Md. 95; *Wilson v. Lewis*, 10 R. I. 285; *Burnham v. Fond Du Lac*, 15 Wis. 193; *People v. Mayor etc.* 2 Neb. 166; *Jenks v. Osceola Township*, 45 Iowa, 554; *Merrell v. Campbell*, 49 Wis. 535; 35 Am. R. 785; *Contra*: *State v. Horton*, 38 N. J. L. 88; and compare *Pendleton v. St. Louis*, 49 Mo. 565.

8 *Ward v. County of Hartford*, 12 Conn. 404; *Erie v. Knapp*, 29 Pa. St. 173; *Moore v. Mayor etc.* 8 Helsk. 850; *Memphis v. Laski*, 9 Helsk. 511; 24 Am. R. 327; *Hadley v. Peabody*, 13 Gray, 200; *Triebel v. Colburn*, 64 Ill. 376; *Wallace v. Sawyer*, 54 Ind. 501; 23 Am. R. 661. But see *Rodman v. Mussellman*, 12 Bush 354; 23 Am. R. 724.

9 *Edgerton v. Municipality*, 1 La. An. 435.

10 *New Orleans v. Ins. Co.* 23 La. An. 61.

11 *Yolo County v. Sacramento*, 36 Cal. 193. And no action will lie against a municipal corporation upon a contract which is *ultra vires*: *Smith v. Buffalo*, 1 Sheld. 493; 19 Abb. L. J. 397.

§ 314. **Nature of counties.**—Counties are political divisions of the state, organized as a part of the machinery of government for the performance of functions of a public nature.¹ They are *quasi* corporations only,² and they are invested with but limited corporate powers.³ They

are creatures of legislative will,⁴ and the legislative power over them is supreme, except as restrained by the constitution.⁵ Thus, the legislature has power to enlarge or diminish the area of counties as expediency may demand;⁶ and it may abolish them whenever necessary in changing county lines, or in creating new counties.⁷ And the law governing a county may be modified at any time according to the will of the legislature.⁸

1 *Barton County v. Walser*, 47 Mo. 189; *Maury Co. v. Lewis Co.* 1 Swan, 236; *Laramie County v. Albany Co.* 92 U. S. 307; *Granger v. Pulaski*, 26 Ark. 37. Compare *Smith v. Myers*, 15 Cal. 33; *People v. Supervisors etc.* 45 Id. 692.

2 See § 10, *ante*; *People v. Ingersoll*, 58 N. Y. 1; 17 Am. R. 173.

3 *Reardon v. St. Louis Co.* 38 Mo. 555; *Ray Co. v. Bentley*, 49 Id. 236; *Goodnow v. Comm'rs etc.* 11 Minn. 31.

4 *Laramie Co. v. Albany Co.* 92 U. S. 307; and see *Gullder v. Dayton*, 22 Minn. 368.

5 *State v. McFadden*, 23 Minn. 40; *State v. Comm'rs etc.* 12 Kan. 426; and see *Wade v. City of Richmond*, 18 Gratt. 533; *State v. County of Dorsey*, 28 Ark. 378.

6 *Laramie County v. Albany County*, 92 U. S. 307; *Sedgwick County v. Bunker*, 16 Kan. 498.

7 *Division of Howard County*, 15 Kan. 194; *Opinion on Township Organization*, 55 Mo. 295.

8 *Freeport v. Supervisors etc.* 41 Ill. 495.

§ 315. Property of counties.—Counties have power to take and hold real property necessary and useful for county purposes.¹ But a grant of a lot of land by an individual, to "the people of" a specified county, not incorporated, is void.² The public property of counties is held for public use,³ in subordination to the sovereign power of the state as exercised by the legislature.⁴ And when a county is divided, the rule for the division and apportionment of the debts and property, between such county and the detached territory, belongs exclusively to the legislature, and not to the courts.⁵ If no provision is made for the apportionment of property and debts, the rule is, that the old county continues owner of its property, and liable for its debts, as they existed at the date of the change.⁶ Records of conveyances in a county clerk's office are not corporate property of the county, and the

clerk, in keeping them, does not act as agent of the county;⁷ and the county board of supervisors have no power to interfere with the clerk's possession of such records, and cannot authorize any person to use them to make indexes, or otherwise, in hostility to the clerk.⁸

1 *Hayward v. Davidson*, 41 Ind. 212; *Supervisors etc. v. Paterson*, 56 Ill. 111; *People v. Ingersoll*, 58 N. Y. 1; 17 Am. R. 178.

2 *Jackson v. Cory*, 8 Johns. 385; *Jackson v. Hartwell*, id. 422. Compare *Goodell v. Jackson*, 20 Johns. 706; *Bow v. Allentown*, 34 N. H. 351. A devise of a permanent fund for educational purposes, to the county of (designating name), "in the State of," etc., is sufficiently definite: *Craig v. Secrist*, 54 Ind. 419.

3 *Stone v. Charlestown*, 114 Mass. 214; *Smith v. Leavenworth*, 15 Kan. 81; *People v. Ingersoll*, 58 N. Y. 1; 17 Am. R. 178.

4 *People v. Ingersoll*, 58 N. Y. 1; 17 Am. R. 178.

5 *Sedgwick County v. Bunker*, 16 Kan. 496.

6 *Hampshire v. Franklin*, 16 Mass. 76; *Laramie County v. Albany County*, 92 U. S. 307.

7 *People v. Nash*, 3 Hun, 535.

8 *People v. Nash*, 3 Hun, 535.

§ 316. Powers of county board.—A board of county commissioners, being a corporation,¹ have no powers except such as are conferred by statute.² Such board is deemed the representative and the guardian of the county, and is clothed with the management and control of its financial interests.³ And the same good faith toward the county is required of commissioners or supervisors as of an ordinary trustee toward his *cestui que trust*, or of an agent towards his principal.⁴ But in matters pertaining either to police or fiscal regulations, they are allowed to perform such duties as may be enjoined upon them by law, without any nice examination into the character of the powers conferred.⁵ And the manner in which a county board, acting in good faith, has exercised a discretion confided to it by law cannot in general be made the subject of revision by the courts.⁶ A county board cannot act until it has been convened in legal session, either regular, adjourned, or special.⁷ And if the general law prescribes the mode of calling a special meeting, the requirements must be observed, or the meeting will not be

legal.⁸ But although a statute fixes certain days for the meetings of county commissioners, this does not preclude them from transacting business on other days.⁹ A county board has discretionary power to amend its records upon new evidence;¹⁰ and it may amend them in accordance with the facts, at any regular meeting of the board.¹¹ The record, as to matters acted upon by the board within its jurisdiction, cannot be impeached collaterally, but is conclusive upon all parties in an action at law.¹²

1 See *Pegram v. Cleveland County*, 65 No. Car. 114; *Sterling v. Parish of Feliciana*, 26 La. An. 59.

2 *State v. Clark*, 73 No. Car. 255.

3 *Shanklin v. Madison County*, 21 Ohio St. 575.

4 *Andrews v. Pratt*, 44 Cal. 309; and see *State v. Clarke*, 73 No. Car. 255; *Supervisors etc. v. Waudell*, 6 Laus. 33.

5 *State v. Ormsby County*, 7 Nev. 392.

6 *Long v. Commissioners etc.* 76 No. Car. 273; *Andrews v. Supervisors etc.* 70 Ill. 65; and compare *Supervisors etc. v. Gorrell*, 20 Gratt. 484; *Matter of Saline County*, 45 Mo. 52.

7 *Paola etc. R. R. Co. v. Anderson County*, 16 Kan. 302.

8 *Goedgen v. Supervisors etc.* 2 Biss. 328; *Paola etc. R. R. Co. v. Anderson County*, 16 Kan. 302.

9 *People v. Green*, 75 No. Car. 329.

10 *Gloucester v. Commissioners etc.* 116 Mass. 579.

11 *Dresden v. Commissioners etc.* 62 Me. 365.

12 *Brewer v. Boston etc. R. R. Co.* 113 Mass. 52. See *Wigginton v. Markley*, 52 Cal. 411.

§ 317. Contracts of counties.—Contracts on behalf of counties, within the scope of their powers, may be made by their officers or agents, as is allowed by law in the case of other corporations;¹ and may be in writing or by parol, according to their nature.² But, as a general rule, county commissioners or supervisors can only contract on behalf of the county by an official act of the board as such, when in session according to law;³ though an offer previously made may be ratified by the board, at a legal session, and the county thus rendered liable.⁴ Thus, the board of supervisors may offer a reward for the recovery of money which has been stolen from the county,⁵ and this may be done by ratification of an offer made while the board was not in session.⁶ And

the county may become liable upon a use of property furnished pursuant to any oral orders for its value.⁷ A county having power to grade and improve its public roads may enter into contracts therefor, and issue warrants in payment.⁸ An account for articles of furniture necessary to properly equip and furnish the county jail, purchased by direction of the board of supervisors, is a proper county charge.⁹ County commissioners may sell shares of stock owned by the county in a railroad company;¹⁰ and in Pennsylvania, they are the sole representatives of the county in making contracts for bridges, and in all proceedings relating to bridges.¹¹ But they have no power to contract for boring oil wells, or sinking coal shafts, either alone or in partnership with others.¹² And, in general, county authorities cannot appropriate the funds of the county for objects not authorized, either expressly or by implication, by the state legislature.¹³ And in the absence of any unusual powers of administration, the representatives of a county have no implied authority to issue negotiable securities, payable in future, so that equities cannot be set up against them in the hands of *bona fide* holders.¹⁴

1 *Montgomery County v. Barber*, 45 Ala. 237; *Ellis v. Washoe County*, 7 Nev. 291; *Commissioners etc. v. Rhoades*, 26 Ohio St. 411; *Babcock v. Goodrich*, 47 Cal. 498; *Hopkins v. Clayton County*, 32 Iowa, 15. See § 44, *ante*.

2 *Ring v. Johnson County*, 6 Iowa, 265; *Montgomery County v. Barber*, 45 Ala. 237.

3 *Potts v. Henderson*, 2 Ind. 327; *Commissioners etc. v. Roes*, 46 Id. 404; *McCabe v. Commissioners etc.* Id. 380; *Rice v. Plymouth County*, 43 Iowa, 136; *Crump v. Supervisors etc.* 52 Miss. 107.

4 See *Mitchell v. Commissioners etc.* 18 Kan. 188; *Clarke v. Lyon County*, 7 Nev. 75; *Talbott v. Parish of Iberville*, 24 La. An. 135.

5 *Hawk v. Marion County*, 48 Iowa, 472. And compare *State v. Freeholders etc.* 37 N. J. L. 254.

6 *Hawk v. Marion County*, 48 Iowa, 472.

7 *Crump v. Supervisors etc.* 52 Miss. 107. Compare *Reichard v. Warren County*, 31 Iowa, 381.

8 *Long v. Boone County*, 32 Iowa, 181.

9 *Schenck v. Mayor etc.* 67 N. Y. 44. See *People v. Supervisors etc.* 20 How. Pr. 173; *Mitchell v. Commissioners etc.* 18 Kan. 188.

10 *Shannon v. O'Boyle*, 51 Ind. 565.

11 Broomall's Appeal, 75 Pa. St. 173. As to the power of county commissioners to lease premises or rent rooms for county purposes: see Gardner v. Dakota County, 21 Minn. 33; Commissioners etc. v. Barnett, 14 Kan. 627. Compare Ford v. Mayor etc. 4 Hun, 547. Commissioners have a right *prima facie* to purchase land for a home for the county poor: Holten v. Lake County, 55 Ind. 194. Compare Stewart v. Otoe County, 2 Neb. 177; Thayer v. McGee, 20 Mich. 193; Supervisors etc. v. Gorrell, 20 Gratt. 484.

12 Burnett v. Abbott, 51 Ind. 254.

13 Harney v. Indianapolis etc. R. R. Co. 32 Ind. 244; and see Hooper v. Ely, 46 Mo. 505; Rothrock v. Carr, 55 Ind. 324; Warren County etc. Co. v. Barr, id. 30; Railroad Co. v. Blanchard, 54 Ill. 240; Jennifer v. Commissioners etc. 2 Dism. 189; Wells v. Supervisors, 102 U. S. 625.

14 Police Jury v. Britton, 15 Wall. 566; Flag v. Parish of St. Charles, 27 La. An. 319; Sterling v. Parish etc. 26 id. 59; Capmartin v. Police Jury, 23 id. 190.

§ 318. County bonds, warrants, etc.—The legislature may authorize the issue and sale of county bonds, by the proper authorities, as a means to provide funds for paying a valid indebtedness of the county;¹ and bonds so issued are negotiable,² and cannot be subjected, in the hands of an innocent purchaser for value, to equities between the county and the original payee.³ Such bonds are personal property, and are deemed to have their *situs* wherever they may be placed for safe keeping.⁴ Money realized from the sale of the bonds of a county, legally issued by authority of the legislature, is the corporate property of the county, and the county treasurer is the legal custodian of it until paid out pursuant to law.⁵ If it be stolen or procured by fraud from the county treasury, the county alone can maintain an action to recover the same, subject, however, like other municipal rights, to the control of the legislature.⁶ It is doubtful whether the officers of a county have implied power to issue orders or warrants which shall be free from equities in the hands of holders;⁷ but warrants or orders issued by such officers have been deemed so far negotiable as to render parties indorsing them liable as indorsers.⁸ A county warrant payable out of a special fund cannot be collected against the county after that fund has been exhausted.⁹ But if a claim is not required by law to be paid out of a special fund, a warrant there-

for is valid, though drawn upon a fund not appropriate to the character of the allowance.¹⁰

1 Barrett v. Schuyler County, 44 Mo. 197; Comm'rs etc. v. People, 5 Neb. 127; Chaska Co. v. Supervisors etc. 6 Minn. 204; Moran v. Milam County, 2 Black, 722; Eltschle v. Franklyn County, 22 Wall. 67. Compare Steins v. Franklin County, 48 Mo. 167; Dent v. Cook, 45 Ga. 323.

2 Mercer County v. Hacket, 1 Wall. 83; Clapp v. Cedar County, 5 Iowa, 15; Thomson v. Lee County, 3 Wall. 327. Compare Douglass v. County of Pike, 101 U. S. 677.

3 Mercer County v. Hacket, 1 Wall. 83; De Voss v. Richmond, 18 Gratt. 338; Barrett v. Schuyler County, 44 Mo. 197; Lynde v. The County, 15 Wall. 6; Craig v. Vicksburg, 31 Miss. 216.

4 State v. Cunningham, 51 Mo. 479.

5 People v. Ingersoll, 58 N. Y. 1.

6 People v. Ingersoll, 58 N. Y. 1.

7 See Smith v. Chesire, 13 Gray, 318; People v. County, 11 Cal. 170; Emery v. Mariaville, 56 Me. 315; Comm'rs v. Keller, 6 Kan. 510; School District v. Thompson, 5 Minn. 280; People v. Gray, 23 Cal. 125; Clark v. Polk County, 19 Iowa, 247; Douglass v. Virginia City, 5 Nev. 147; Smith v. Law, 21 N. Y. 296; Bauer v. Franklin County, 51 Mo. 205; School District v. Stough, 4 Neb. 357; Newell v. School Directors, 66 Ill. 514; Wall v. County of Monroe, 103 U. S. 74; County of Ouachita v. Wolcott, id. 559.

8 Campbell v. Polk County, 3 Iowa, 467; Bull v. Sims, 23 N. Y. 570. Compare Keller v. Hicks, 22 Cal. 457. Payment of a county order or warrant by the treasurer or other proper officer, acting in good faith, discharges the indebtedness, although such payment was made after maturity of the order: Sweet v. Comm'rs etc. 16 Minn. 106.

9 Campbell v. Polk County, 49 Mo. 214; and see Comm'rs v. Cox, 1 Ind. 403; Day v. Callow, 39 Cal. 563; Argenti v. San Francisco, 16 Id. 256; Mitchell v. Speer, 39 Ga. 56.

10 Supervisors v. Klein, 51 Miss. 807. Compare Montague v. Horan, 12 Wis. 399; Kelley v. Mayor etc. 4 Hill, 263; International Bank v. Franklin County, 58 Mo. 106; 27 Am. R. 261.

§ 319. Liability of county for wrongs.—Counties are not subject to common-law liabilities of persons generally,¹ and are liable for wrongs only when committed in the use or misuse of the corporate powers conferred on them.² The statute which creates them prescribes all their duties, and imposes all the liabilities to which they are subject;³ and they are not liable to persons injured by the wrongful neglect of duty, or wrongful acts of their officers or agents, done in the course of the execution of corporate powers, or in the performance of corporate duties, unless such liability be expressly imposed by statute.⁴ Thus, there is no duty of maintaining bridges

cast by law upon counties as such;⁵ and in order to charge the county for the neglect of officers whose duty it is to cause bridges to be built, and the public roads to be kept in order, a statutory liability must be shown.⁶ Nor is a county responsible, unless made so by statute, for injuries caused by the unsafe and dangerous condition of county buildings;⁷ as where a witness, in attendance at court, was injured in consequence of the negligent omission of the agents or officers of the county to guard a dangerous opening leading into the cellar of the court-house.⁸ Nor is a county liable for damages sustained by adjoining residents or landowners, by reason of the erection or maintenance of a county jail, even though it is a nuisance;⁹ nor is it liable for an escape caused by the insufficiency of the jail;¹⁰ nor for injuries sustained by an individual, through vacation of a road, ordered by the board of commissioners.¹¹

1 Symonds v. Supervisors etc. 71 Ill. 355; Barbour County v. Horn, 48 Ala. 649; Larkin v. Saginaw County, 11 Mich. 88; Treadwell v. Comm'rs, 11 Ohio St. 190.

2 Barbour County v. Horn, 48 Ala. 649. Compare Hannon v. County of St. Louis, 62 Mo. 313.

3 Van Eppes v. Comm'rs, 25 Ala. 460; Jacobs v. Hamilton County, 1 Bond, 500; and see Bray v. Wallingford, 20 Conn. 416; Commonw. v. Brice, 22 Pa. St. 211.

4 Symonds v. Supervisors etc. 71 Ill. 355; State v. St. Louis County Court, 34 Mo. 546; Peters v. State, 9 Ga. 109; Scales v. Ordinary etc. 41 Id. 225.

5 Scales v. Ordinary etc. 41 Ga. 225; and see Huffman v. San Joaquin County, 21 Cal. 426; Cooley v. Freeholders, 3 Dutch. 415; Brabham v. Supervisors, 54 Miss. 363; 28 Am. R. 352; Wood v. Tipton County, 7 Baxt. 112; 32 Am. R. 561.

6 See Chicago v. McGinn, 51 Ill. 266; Wheatley v. Mercer, 9 Bush, 704; Elkenberry v. Township, 22 Kan. 556; 31 Am. R. 198; Humphreys v. County, 56 Pa. St. 204; Smoot v. Wetumpka, 24 Ala. 112; Barbour County v. Horn, 48 Id. 649; Shus v. Butler County, 49 Id. 110; Askew v. Hale County, 54 Id. 639; 25 Am. R. 730; Krause v. Davis County, 44 Iowa, 141; Moreland v. Mitchell County, 40 Id. 324; Penn Township v. Perry County, 78 Pa. St. 457; State v. Supervisors etc. 41 Wis. 28; Supervisors etc. v. Arrghl, 51 Miss. 667; House v. Board of Comm'rs, 60 Ind. 580; 28 Am. R. 667.

7 Comm'rs etc. v. Mighels, 7 Ohio St. 109; and see Ward v. County of Hart, n.d., 12 Conn. 404; Haygood v. Justices, 20 Ga. 845; Morey v. Town of Newfane, 8 Barb. 645; Bigelow v. Randolph, 14 Gray, 541; Hollenbeck v. Winnebago County, 95 Ill. 148; 35 Am. R. 151; Wood v. Tipton Co. 7 Baxt. 112; 32 Am. R. 561.

8 Comm'rs etc. v. Mighels, 7 Ohio St. 109.

9 *Wehn v. Comm'rs etc.* 5 Neb. 494; 25 Am. R. 497.

10 *Governor v. Justices etc.* 19 Ga. 17.

11 *Comm'rs etc. v. Venard*, 10 Kan. 88.

§ 320. Allowance of county claims.—In the exercise of the power to audit and allow claims, the auditing board must confine itself to the allowance of such claims as grow out of contracts which the county has authority to make,¹ and which are legally chargeable against the county.² It has been held that boards of audit, in auditing claims against a county, act judicially, and that their decisions are conclusive and binding alike upon the county and the claimant.³ In Missouri, they act only as the financial agents of their respective counties, and settlements made by them are open to the correction of mistakes.⁴ So in New York, the board of supervisors of a county has power to rescind a resolution auditing and allowing a claim against the county, upon discovery of a mistake or error.⁵ But where the board has not exceeded its powers, the auditor cannot assume to set up his judgment in opposition to that of the board, in respect to the issuance of a warrant on an account against the county.⁶ A state legislature has not power to enact that no existing claim against a certain county shall be considered a legal claim, unless audited and allowed by a board of commissioners created by the act;⁷ nor can it require the creditors of a county to surrender their evidences of indebtedness, and accept new ones differing in terms from the old.⁸ Services of a medical man, rendered in making a *post-mortem* examination at request of the coroner,⁹ or by order of the district attorney,¹⁰ are properly chargeable against the county.¹¹ So of medical services rendered to prisoners by authority of the county board;¹² or medical services rendered to persons as paupers of a township in pursuance of an employment by the proper township trustee.¹³ A county is liable for the costs of an unsuccessful action prosecuted for its benefit.¹⁴ And where a county fails to provide a jail, it may be held liable for the

expense of guarding a prisoner removed thither by change of venue.¹⁵ But a county is not liable for the wages of a jailer appointed by the sheriff;¹⁶ nor for compensation to an attorney appointed by the court to conduct the defense of a pauper prisoner.¹⁷ Nor can a board of supervisors lawfully engage a county in or bind it to the payment of the expenses of a litigation by an individual to establish his right to an office, and the audit and payment of such a claim is unlawful.¹⁸

1 English v. Chicot County, 26 Ark. 454.

2 Supervisors etc. v. Ellis, 59 N. Y. 620; Linden v. Case, 46 Cal. 171. Oral allowance of a claim by the board not good: Cricket v. State, 18 Ohio St. 8.

3 Arthur v. Adam, 49 Miss. 404; Commissioners etc. v. Gregory, 42 Ind. 32.

4 State v. Roberts, 62 Mo. 388; Reppy v. Jefferson County, 47 Id. 66.

5 People v. Supervisors etc. 65 N. Y. 222. Compare People v. Green, 64 Barb. 162; Supervisors etc. v. Roche, 65 Ill. 77.

6 Babcock v. Goodrich, 47 Cal. 498; and see State v. Richter, 37 Wis. 275; State v. Buckles, 39 Ind. 272; People v. Supervisors, 45 N. Y. 196.

7 Rose v. Estudillo, 39 Cal. 270.

8 People v. Morse, 43 Cal. 534.

9 Allegheny County v. Shaw, 34 Pa. St. 301.

10 Sherman v. Supervisors etc. 30 How. Pr. 173.

11 Sherman v. Supervisors etc. 30 How. Pr. 173.

12 Roberts v. Commissioners etc. 10 Kan. 29. Compare Commonw. v. Hall, 7 Watta, 290.

13 Commissioners etc. v. Holman, 34 Ind. 256.

14 Dover v. State, 45 Ala. 244. Compare People v. Supervisors, 45 N. Y. 196.

15 Ransom v. Gentry County, 48 Mo. 341. Compare James v. Commissioners etc. 5 Neb. 38; Davis v. Commissioners etc. 9 Kan. 635; Commissioners etc. v. Commissioners etc. 75 No. Car. 240.

16 Union County v. Patton, 63 Ill. 458.

17 Lamont v. Solano County, 49 Cal. 153; People v. Supervisors etc. 78 N. Y. 622; Posey v. Mobile County, 50 Ala. 6. But see Gordon v. Commissioners etc. 52 Ind. 323.

18 Supervisors etc. v. Ellis, 59 N. Y. 620. The board of supervisors may employ a person to take charge of the county offices in the courthouse, and the expense incurred thereby is a legal county charge: Conway v. Mayor etc. 6 Daly 515.

§ 321. Suit against county.—Suit may be brought against a county as such, upon any complete cause of action or claim against it, for which no other specific remedy is provided by law.¹ But it is made a general

rule, by statute, that a claim or demand proper to be audited by the county board cannot be made the subject of an action, until due presentment to the board, and a refusal to allow it.¹ This rule is founded on the propriety, in the case of counties, of giving notice of the claim and an opportunity to pay without suit;² and it applies even in the case of a money judgment against a county;³ but not to a claim against a county for damages for property destroyed by a mob;⁴ nor to a claim in favor of a county solicitor, payable out of the fines and forfeitures in the county treasury.⁵ Like other municipal corporations, counties are liable to suits in the Federal Courts, as citizens of the state in which they are located.⁷ If the fiscal affairs of a county are committed to a board of commissioners, suits against the county may be brought against such board, and service on a majority of the commissioners is sufficient.⁸

1 *Adams v. Tyler*, 131 Mass. 380; *Lowndes County v. Hunter*, 49 Ala. 507; *Commissioners etc. v. Hurd*, 49 Ga. 462; *Taylor v. Mayor etc.* 82 N. Y. 10. See *Rock Island v. Steele*, 31 Ill. 543; *People v. Commissioners etc.* 50 Ill. 213; *Klein v. Supervisors etc.* 51 Miss. 878; *Murphy v. Commissioners etc.* 14 Minn. 67. When *mandamus* is a proper remedy: see *Commissioners etc. v. Moore*, 53 Ala. 25; *Connor v. Morris*, 23 Ala. 447.

2 *Hohman v. Comal County*, 34 Tex. 36; *Jones v. Commissioners etc.* 73 No. Car. 182; *Taylor v. Marion County*, 51 Miss. 731; *Commissioners etc. v. Wood*, 35 Ind. 70; *Raymond v. Commissioners etc.* 18 Minn. 60; *Armstrong v. Tama County*, 34 Iowa, 309; *Barbour County v. Horn*, 41 Ala. 114. See, as to the running of the statute of limitations against county claim: *Dunwiddie County v. Stuart*, 28 Gratt. 526.

3 *McLendon v. Commissioners etc.* 71 No. Car. 38.

4 *Alden v. Alameda County*, 43 Cal. 270.

5 *Clear Lake etc. Co. v. Lake County*, 45 Cal. 96.

6 *Palmer v. Fitts*, 51 Ala. 489.

7 *McCoy v. Washington County*, 3 Wall. Jr. 381; and see *Cowles v. Mercer County*, 7 Wall. 118.

8 *Collins v. Hudson*, 54 Ga. 25. Compare *Commissioners etc. v. Paine, Wright*, (Ohio) 417; *Gross v. Sioux County*, 2 Dill. 509.

§ 322. Nature and power of school districts.—

A school district is a public territorial corporation, required by statute to establish and maintain necessary schools within its limits.¹ Such bodies are deemed *quasi* corporations, having the powers expressly granted to

them, and such implied powers as are necessary to enable them to perform their duties, and no more.² School districts in Massachusetts are, by statute, placed on the same footing in regard to the objects for which they are created, as towns, parishes, or other municipal corporations.³ In New Jersey, trustees of such districts are municipal officers.⁴ In Rhode Island, a school district may give, and is bound by, a promissory note for money borrowed to pay debts legally incurred.⁵ Under a statutory power to sue and be sued, school districts may appoint and instruct agents to conduct litigation.⁶ A school society in Connecticut is competent to take a bequest or devise, in trust, for educational purposes.⁷ So of boards of trustees for common schools in the respective wards of the city of New York.⁸ Under a power to alter the limits of school districts, a town may unite two existing districts;⁹ in which case, the district so formed is alone liable for the antecedent debts of each.¹⁰ A school district loses none of its rights by being divided and changing its name.¹¹ But upon such division, the old district has no authority to use property or funds to which the new one is entitled.¹² Where a school district has for years assumed to possess and exercise all the rights and franchises of a regularly organized corporation with the entire acquiescence of the public, the regularity of its organization cannot be collaterally questioned.¹³ The inhabitants of a school district have no right to use the school-house of the district for religious meetings and Sunday-schools, against the objection of a tax payer of the district, although the district may have voted to allow such use;¹⁴ and an injunction will lie at the suit of such tax payer to restrain the use.¹⁵

1 *Gilman v. Bassett*, 33 Conn. 298; and see *People v. Trustees etc.* 78 Ill. 136; *Whitmore v. Hogan*, 22 Me. 564; *Farnum's Petition*, 51 N. H. 376; *Williams v. Franklin Township etc.* 26 Ind. 310.

2 *Inhabitants etc. v. Wood*, 13 Mass. 193; *Beach v. Leahy*, 11 Kan. 23; *Burgess v. Pae*, 2 Gill. 254; *Harris v. School District*, 8 Post. 58. Compare *Winspear v. Holman*, 37 Iowa, 542; *School District v. Gage*, 39 Mich. 484; 33 Am. R. 421.

3 *Waldron v. Lee*, 5 Pick. 323.

4 *State v. Deahler*, 1 Dutch. 177. But see *People v. Bennett*, 54 Barb. 480.

5 *Clarke v. School District No. 7*, 3 R. I. 199.

6 *Denniston v. School District No. 11*, 17 N. H. 492.

7 *First Cong. Soc. v. Atwater*, 23 Conn. 34.

8 *Betts v. Betts*, 4 Abb. N. C. 317.

9 *Converse v. Porter*, 45 N. H. 385. See *Bacon v. School District*, 97 Mass. 421; *Greenbanks v. Boutwell*, 43 Vt. 207.

10 *Brewer v. Palmer*, 13 Mich. 104. See *Clement v. Everest*, 29 id. 19; *People v. Ryan*, 19 id. 203.

11 *School District No. 3 v. Macloon*, 4 Wis. 79.

12 *People v. Hodge*, 4 Neb. 265. Compare *Township v. Independent Districts etc.* 36 Iowa, 220; *State v. Rice*, 35 Wis. 178; *Kuhn v. Board of Education*, 4 W. Va. 499.

13 *Stuart v. School District*, 30 Mich. 69. Compare *Trumbo v. People*, 75 Ill. 561; *Route v. Sedgwick*, 4 Abb. N. Y. App. 73; *State v. North*, 42 Conn. 79; *Collins v. Inhabitants etc.* 52 Me. 522; *People v. Newberry*, 87 Ill. 41.

14 *Scotfield v. School District*, 27 Conn. 499; and see *Dorton v. Hearn*, 67 Mo. 301. But a statute authorizing such use of a school-house is constitutional: 93 Ill. 61; 34 Am. R. 160.

15 *Scotfield v. School District*, 27 Conn. 499; *School District No. 8 v. Arnold*, 21 Wis. 657; *Spencer v. Joint School District*, 15 Kan. 259; 22 Am. R. 268.

§ 323. Powers of school board.—School boards, though deemed civil corporations,¹ possess only certain specially defined powers, and can exercise no others, except such as may fairly be implied from those granted.² The legislature may confer upon them power to assess taxes for school purposes;³ and this implies a power to make a valuation of the property for the purpose of levying the assessment.⁴ A board of school directors may ratify a contract informally entered into, so as to render it valid, if it be one they had power to make in the first instance;⁵ otherwise, of a contract which they could not lawfully have made.⁶ Under a power to raise money for the purpose of erecting, hiring, or purchasing "a building to be used as a school-house," a school district may build a hall in connection with a school-house, for district school purposes.⁷ And contracts by the board of directors on behalf of the district, for the purchase of libraries and apparatus,⁸ or of a musical instrument,⁹ to be paid

for out of any unappropriated funds of the district, have been sustained.¹⁰ But it was held that a statute authorizing school boards, to provide "necessary appendages" for school-houses during the time that schools are taught, does not authorize the purchase of a stereoscope and stereoscopic views.¹¹ And a board of school directors have no power to make acceptances of orders or bills of exchange, so as to bind the school district and create a right of action thereon against them.¹² School authorities may exclude from their grounds and buildings any who enter therein to disturb the peace, or to interfere with the legitimate exercises of the school.¹³ And generally speaking, school boards have power to prescribe regulations governing the admission of pupils,¹⁴ or to direct their suspension or expulsion for adequate cause;¹⁵ so they have power to contract with and employ teachers,¹⁶ and to determine their salaries,¹⁷ and to dismiss them for sufficient cause.¹⁸ And if the legislative power of the state has placed the management of the public schools under the exclusive control of the school boards, the judicial power will not assume to direct what instruction shall be given, or what books shall be read therein.¹⁹ And where, under a statute making provision therefor, separate schools for colored children are maintained, such children may be lawfully excluded from schools established for white children;²⁰ otherwise, if separate schools for colored children are not so maintained.²¹ Individual members of a school board, acting separately, although enough to constitute a majority, cannot contract so as to bind the district;²² and an agreement by them to ratify a contract so attempted, at the next meeting of the board, is contrary to public policy, and therefore illegal and void.²³ But a sole trustee of a school district in New York has power to contract with and employ a teacher;²⁴ and if such contract be made for a period extending beyond the trustee's term of office, it is binding upon his successor.²⁵

1 See *School Commissioners v. Putnam*, 44 Ala. 506; *State v. Bremond*, 38 Tex. 116; *Connell v. Woodard*, 5 How. (Miss.) 665; *Horton v. School Commissioners*, 43 Ala. 598.

2 *Peers v. Board of Education*, 72 Ill. 508; *Stevenson v. School Directors*, 87 Id. 355; and see *People v. Dupuyt*, 71 Id. 651; *Hill v. School District*, 17 Mo. 316.

3 *State v. Bremond*, 38 Tex. 116; and see *Horton v. School Commissioners*, 43 Ala. 598.

4 *Richardson v. Sheldon*, 1 Pinn. 624.

5 *Stevenson v. Township*, 35 Iowa, 462; and compare *School District v. Aetna Ins. Co.* 62 Mo. 330; *Davis v. School District*, 44 N. H. 398.

6 *Wells v. People*, 71 Ill. 532; *Board of Education v. Thompson*, 33 Ohio St. 321. But compare *Scott v. School District*, 46 Vt. 452; *Cook v. North McGregor*, 40 Iowa, 444.

7 *Greenbanks v. Boutwell*, 43 Vt. 207. See also *George v. School District*, 6 Met. 497.

8 *Clark v. School Directors*, 78 Ill. 474.

9 *Bellmeyer v. Independent District*, 44 Iowa, 564.

10 *Clark v. School Directors*, 78 Ill. 474; *Bellmeyer v. Independent District*, 44 Iowa, 564. Compare *School District v. Stough*, 4 Neb. 357.

11 *School District v. Perkins*, 21 Kan. 536; 30 Am. R. 447.

12 *Peers v. Board of Education*, 72 Ill. 508. Compare *School Directors v. Miller*, 54 Id. 398; *Bayliss v. Pearson*, 15 Iowa, 279; *Weare v. School District*, 44 N. H. 189.

13 *Hughes v. Goodell*, 3 Pittsb. Rep. 264.

14 *State v. McCann*, 21 Ohio St. 198; *People v. Easton*, 13 Abb. Pr. N. S. 189; *Learock v. Putnam*, 111 Mass. 499; *Ferriter v. Tyler*, 48 Vt. 444. Compare *Trustees v. People*, 87 Ill. 303; 29 Am. R. 55; *State v. Burton*, 45 Wis. 150; 30 Am. R. 706.

15 *Roe v. Deming*, 21 Ohio St. 666; *Murphy v. Directors etc.* 30 Iowa, 429; *Dritt v. Snodgrass*, 66 Mo. 286; 27 Am. R. 343; *Morrow v. Wood*, 35 Wis. 59; *Peck v. Smith*, 41 Conn. 442; *Rulison v. Post*, 79 Ill. 567; *Ferriter v. Tyler*, 48 Vt. 444; 21 Am. R. 133; *McCormick v. Burt*, 95 Ill. 263; 35 Am. R. 163.

16 *Puterbaugh v. Township*, 53 Mo. 472; *Potter v. Fredricksburg*, 40 Iowa, 369; *Wilson v. East Bridgeport School District*, 38 Conn. 280; *Jones v. Nebraska*, 1 Neb. 176. Compare *Everett v. School District*, 30 Mich. 249; *Wilson v. Board of Education*, 63 Mo. 137.

17 *Charlestown v. Gardner*, 98 Mass. 587; *State v. Wilcox*, 11 Ohio St. 326.

18 *Directors etc. v. Burton*, 26 Ohio St. 421; *Crawfordsville v. Hays*, 42 Ind. 200; *Morrison v. McFarland*, 51 Ind. 208; *Holden v. School District*, 38 Vt. 529; *School District v. Cololu*, 10 Kan. 283.

19 *Board of Education v. Minor*, 23 Ohio St. 211. An act providing for uniformity of text-books for public schools is constitutional: *Currer v. Morrill*, 25 Minn. 1; 33 Am. R. 450.

20 *Ward v. Flood*, 48 Cal. 36; 17 Am. R. 405; *Cory v. Carter*, 48 Ind. 327; 17 Am. R. 738; *Dallas v. Fosdick*, 40 How. Pr. 249.

21 *State v. Duffy*, 7 Nev. 342; 8 Am. R. 713.

22 *State v. Treasurer etc.* 22 Ohio St. 144; and see *Johnson v. School District*, 67 Mo. 319; *State v. Leonard*, 3 Tenn. 177; *Passage v. School Inspectors*, 19 Mich. 330; *Holbrook v. Faulkner*, 55 N. H. 311; *Johnson v. School District*, 67 Mo. 319.

23 *McCortle v. Bates*, 29 Ohio St. 419; 23 Am. R. 758.

24 *Walt v. Ray*, 67 N. Y. 36.

25 *Walt v. Ray*, 67 N. Y. 36; *Gillis v. Space*, 63 Barb. 177. But see *Taylor v. School Committee*, 5 Jones, 93.

§ 324. *Liability of school officers.*—Money borrowed by the directors for school purposes, or the principal and interest of loans from the school fund, must be deposited with or paid to the treasurer of the school district.¹ If deposited with or paid to any one else, and is lost, the directors are liable therefor.² But the treasurer is absolutely liable for all funds which come into his hands in his official capacity.³ Committeemen of a school district are personally liable on a promissory note signed merely with their individual names, though describing themselves as such committee.⁴ A prudential committee of a school district is liable to a suit by the district for a neglect to appropriate to the support of schools money assigned to the district and received by him therefor, even after the expiration of his term of office.⁵ In order to sustain an action against school directors for maliciously conspiring to remove a teacher, it is incumbent on the plaintiff to prove malice, an intent to injure, and an unlawful conspiracy on the part of the directors, as public officers.⁶ The board of education of the city of New York is subject to the obligations incident to the exercise of corporate powers;⁷ and is liable for personal injuries caused by its neglect of duties imposed upon it by law.⁸

1 *Adams v. State*, 82 Ill. 132; *Mahaska County v. Searle*, 44 Iowa, 492.

2 *Adams v. State*, 82 Ill. 132.

3 *Bluff Creek v. Hardinbrook*, 40 Iowa, 130. See also § 311, *ante*.

4 *Bayliss v. Pearson*, 15 Iowa, 279.

5 *School District v. Sherburne*, 43 N. H. 52. Compare *Coffman v. Parker*, 11 Kan. 9.

6 *Burton v. Fulton*, 49 Pa. St. 151.

7 *Donovan v. Board of Education*, 55 How. Pr. 176. Compare *Dannat v. Mayor etc.* 6 Hun, 88; 66 N. Y. 583; *Clarisey v. Metrop. Fire Depart.* 18weeny, 224; 7 Abb. Pr. N. S. 352; *Woolbridge v. Mayor etc.* 49 How. Pr. 67.

8 *Donovan v. Board of Education*, 12 Jones & S. 53; 55 How. Pr. 176.

CHAPTER XXII.

ASSOCIATIONS.

- § 325. Voluntary, nature of.
- § 326. Powers of, in general.
- § 327. Bequests and devises.
- § 328. Powers and duties of officers.
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§ 325. Voluntary, nature of.—In this country, voluntary unincorporated associations are in law usually deemed to be nothing more than ordinary partnerships, and the laws respecting them are in general the same;¹ and especially is this the case as it respects the relations of such an association or its members to third persons.² And even as it regards controversies among the members themselves, the general law of partnership is held to apply, except so far as it may be modified by the articles of association.³ Nevertheless, such associations have some elements in common with corporations;⁴ and with respect to their exercise of reserved and inherent powers to regulate the conduct of, or to expel members, they are subject to the control of courts of justice the same as are corporations or joint-stock companies.⁵ In England, societies and clubs not formed directly for pecuniary advantage,

or for the purpose of sharing profits, are not deemed partnerships;⁶ but are rather regarded as in the nature of agencies.⁷

1 Wells v. Gates, 18 Barb. 554; Moore v. Brink, 4 Hun. 402; Lafond v. Deems, 1 Abb. N. C. 318; 53 How. 41; Tyrrell v. Washburn, 6 Allen, 466; Butterfield v. Beardsley, 28 Mich. 412. Compare White v. Brownell, 3 Abb. Pr. N. R. 318; 2 Daly, 329; Hyde v. Woods, 94 U. S. 523; 2 Sawyer, 655; Livingston v. Lynch, 4 Johns. Ch. 573; Lafond v. Deems, 8 Abb. N. C. 344.

2 Babb v. Reed, 5 Rawle, 151; and see Bullard v. Kinney, 10 Cal. 60; McMahon v. Rauh, 47 N. Y. 67; Foley v. Tovey, 54 Pa. St. 190; Atkins v. Hunt, 14 N. H. 205; Harrison v. Hoyle, 24 Ohio St. 254; National Bank v. Laudon, 45 N. Y. 410; Whipple v. Parker, 29 Mich. 370.

3 Tyrrell v. Washburn, 6 Allen, 466; Leech v. Harris, 2 Brewst. 571; Bullard v. Kinney, 10 Cal. 60; Beaumont v. Meredith, 3 Ves. & B. 180.

4 See Irvine v. Forbes, 11 Barb. 587; Cox v. Bodfish, 35 Me. 302; Thomas v. Ellmaker, 1 Pars. Sel. Cas. 98; Oliver v. Liverpool etc. Ins. Co. 100 Mass. 531.

5 Leech v. Harris, 2 Brewst. 571.

6 Todd v. Emly, 8 Mees. & W. 505; Caldicott v. Griffiths, 8 Ex. 808. See § 328, *post*.

7 Fleming v. Hector, 2 Mees. & W. 172; and see Wood v. Finch, 2 Post. & F. 447; In re St. James's Club, 2 De Gex, M. & G. 383.

§ 326. Powers of, in general.—An ordinary unincorporated voluntary association cannot sue in a corporate capacity;¹ but being deemed a partnership, suit may be brought in the name of the partners, or in the name of one or more for the use of all.² A part of the members of a voluntary association cannot bind the others without their consent previously given, or a subsequent ratification;³ except in cases where the act done is so clearly in furtherance of the object for which the association was organized that consent or ratification may be presumed.⁴ A statute authority claimed by a particular association to do that which the general municipal law prohibits, as the keeping of public gaming-tables, should be strictly construed;⁵ and unless the power claimed is clearly conferred, it should not be accorded.⁶

1 Mears v. Meulton, 30 Md. 142; and see Niven v. Spickerman, 13 Johns. 401. Compare Phipps v. Jones, 20 Pa. St. 260.

2 Pipe v. Bateman, 1 Iowa, 389; Gorman v. Russell, 14 Cal. 531; Wood v. Draper, 24 Barb. 187; 4 Abb. Pr. 322; Birmingham v. Gallagher, 112 Mass. 190. See Ewing v. Medlock, 5 Port. (Ala.) 82.

3 Sizer v. Daniels, 66 Barb. 426. Compare Sullivan v. Campbell, 2 Hall, 271.

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4 *Sizer v. Daniels*, 66 Barb. 439.

5 *Alcardi v. State*, 19 Wall. 635.

6 *Alcardi v. State*, 19 Wall. 635. A voluntary association cannot, as such, hold real estate: *Baptist Church v. Baptist etc. Soc.* 44 Conn. 389.

§ 327. **Bequests and devises.**—It has been held that voluntary unincorporated associations have not legal capacity to take property by will, even for purposes denominated "charitable."¹ Other cases, however, hold that a bequest or devise to such an association may be valid;² or, at least, may be made to take effect indirectly.³ A judgment recovered against the vendor after a purchase of lands by a voluntary association, and after the registry of the deed, but before incorporation, and any levy, is subject to the trust in favor of the association;⁴ and the judgment creditor may be enjoined from accepting a deed, or attempting to sell by virtue of his judgment.⁵

1 *White v. Howard*, 46 N. Y. 144; *Leonard v. Davenport*, 58 How. Pr. 384; *Sherwood v. American Bible Soc.* 4 Abb. N. Y. App. 227; *Goessels v. Blineler*, 5 McLean, 223; *McKeon v. Kearney*, 57 How. Pr. 349.

2 See § 52, *ante*.

3 *Gibson v. McCall*, 1 Rich. 174; *Preachers' Aid Soc. v. Rich*, 45 Mo. 582; *Swasey v. American Bible Soc.* 57 Id. 523; *Cory Universalist Soc. v. Beatty*, 27 N. J. Eq. 670; and see 2 *Perry on Trusts*, § 730.

4 *African M. E. Church v. Conover*, 27 N. J. Eq. 157.

5 *African M. E. Church v. Conover*, 27 N. J. Eq. 157.

§ 328. **Powers and duties of officers.**—Directors of an unincorporated company occupy the position of trustees toward the members, and any gain accruing to them from the discharge of their official duties must inure to the benefit of their *cestuis que trust*.¹ Express proof of authority from the partners, or of a necessity to draw bills, in the conduct of the business, is required to justify directors in drawing bills on the credit of the association.² And where the president and some of the members bought and paid for property for the association, without authority, a ratification by the managers, who had no authority to borrow money or increase the capital, was held

to be inoperative to bind the members.³ So where the articles of association provided that the agents and trustees should have no authority to bind the association by any contract, unless it contained a restriction that payment should be made solely out of the joint property of the association, an oral contract made by the president with the plaintiff, for work to be done by the latter, was held to be void;⁴ but the association having received the benefit of the work, its members were held liable to the plaintiff for it on a *quantum meruit*.⁵ It was, however, held that the trustees of an unincorporated land company were not entitled to be allowed in their account for expenditures made without authority, although such expenditures greatly enhanced the value of the land.⁶ A rule of a society, "that no officer be permitted to occupy his chair while under charges," etc., should not be so construed as to exclude the officer from the performance of all the duties of his office, but merely to prevent him from occupying his chair at meetings.⁷ A voluntary association cannot confer judicial powers on its officers or committees;⁸ the creation of judicial tribunals is one of the functions of the sovereign power.⁹

1 Coal Company v. Fry, 5 Phila. 129.

2 Dickinson v. Valpy, 5 Man. & R. 128; 16 Barn. & C. 128.

3 Crum's Appeal, 66 Pa. St. 474.

4 Sullivan v. Campbell, 2 Hall, 271.

5 Sullivan v. Campbell, 2 Hall, 271.

6 McKinley v. Irvine, 13 Ala. 681. After the dissolution of a voluntary association, neither commissioners appointed to wind it up, nor their agents, have power to bind the members by any new engagement: Lake v. Mumford, 4 Smedes & M. 312.

7 Potter v. Search, 7 Phila. 443.

8 Austin v. Searing, 16 N. Y. 112; and see Savannah Cotton Exchange v. State, 54 Ga. 668.

9 Austin v. Searing, 16 N. Y. 112.

§ 329. Liability of officers.—The treasurer of a voluntary association for charitable purposes will be held liable to account for the money in his hands, and to pay it over to those entitled to receive it according to the in-

terests of the association.¹ An agent of a voluntary association, who does not disclose the fact of his agency at the time of making a contract, is personally liable thereon,² unless by the subsequent facts, and the acts of the other contracting party in connection therewith, he has been discharged from such liability.³ And a committee appointed by a voluntary association to make arrangements for a public exhibition were held individually liable for work necessary for the occasion, which a sub-committee of their number procured to be done, although in making the contract the sub-committee assumed to act as officers of the association.⁴ The trustees of an association cannot, however, be held individually liable for its debts, unless they have in some way specially incurred individual liability.⁵

1 Penfield v. Skinner, 11 Vt. 296; and see Koehler v. Brown, 2 Daly, 78; Bennett v. Wheeler, 12 La. An. 761; Willson v. Owen, 30 Mich. 474.

2 Hutchinson v. Wheeler, 3 Allen, 577; and see Butler v. Evening Mail Assoc. 2 Jones & S. 58; Wells v. Turner, 16 Md. 133.

3 Hutchinson v. Wheeler, 3 Allen, 577. Compare Allen v. Clark, 65 Barb. 563.

4 Fredendell v. Taylor, 23 Wis. 538. Compare Sizer v. Daniels, 68 Barb. 426; Secor v. Lord, 4 Abb. N. Y. App. 188; 3 Keyes, 525.

5 Wolf v. Schlieffer, 2 Brewst. 563.

§ 330. Rights of members.—The privileges of membership in a voluntary association are merely created by the organization itself, and courts of law cannot compel the admission of an applicant for membership.¹ No one is under any obligation to become a member; but when he does become one, and subscribes the constitution and by-laws, thereby accepting and assenting to the conditions prescribed, he acquires such rights, with such limitations, and no others, as the articles of association provided for.² Each member has a right to demand and expect from his associates good faith in all that relates to their common interests, and no one will be permitted to take to himself a secret and separate advantage to the prejudice of the others.³ Thus, one member cannot

cause to be transferred to the company property previously purchased by himself, at a price in excess of that paid by him therefor, without accounting for the profit.⁴ But owners of property, real or personal, may form an association with others, and sell that property to the association at any price, provided no fraudulent representations are made by the vendors.⁵ The privileges of honorary membership in a fire company, if such membership has never been declared forfeited by the proper authority, and in the proper manner, are not lost by non-user;⁶ nor are they forfeited by temporary membership in another company, in violation of a by-law of the original company, if acquiesced in by the company.⁷ Where membership in an association is of pecuniary value, as in the case of a stock exchange board, the right of a member to a seat therein is not such property as can be attached at the suit of a creditor of the member.⁸ And a provision in the constitution of the association, that a member, upon failing to perform his contracts, or becoming insolvent, may assign his seat to be sold, and that the proceeds shall, to the exclusion of his outside creditors, be first applied to the benefit of the members to whom he is indebted, is not contrary to public policy.⁹

1 White v. Brownell, 3 Abb. Pr. N. S. 318; 4 id. 162; 2 Daly, 329.

2 Hyde v. Woods, 2 Sawy. 655; 94 U. S. 523; Fischer v. Raab, 57 How. Pr. 87.

3 Getty v. Devlin, 54 N. Y. 403; and compare Secor v. Lord, 4 Abb. N. Y. App. 188; 3 Keyes, 525.

4 Getty v. Devlin, 54 N. Y. 403.

5 Densmore Oil Co. v. Densmore, 61 Pa. St. 43.

6 Harmstead v. Washington Fire Co. 1 Pa. Leg. Gaz. 392.

7 Harmstead v. Washington Fire Co. 1 Pa. Leg. Gaz. 392.

8 Pancoast v. Houston, 17 Alb. L. J. 172.

9 Hyde v. Woods, 2 Sawy. 655; 94 U. S. 523.

§ 331. Liability of members individually.—The members of a voluntary incorporated association are, in general, liable as partners to third parties, to the full extent of the indebtedness of the association.¹ And each

one continues liable so long as he remains a member, and after he ceases to be a member, and until notice to the creditors of the association of his withdrawal therefrom.² If one of the members die, a creditor of the association must proceed and exhaust his remedy against the surviving members before he can maintain an action against the personal representatives of the deceased member.³ If goods are furnished on the order of an agent of the association, with the concurrence and approbation of the members, they are liable therefor.⁴ The liability of individual members, growing out of the association, is generally to be determined by the law of the place where the association was formed, and where it had its place of business;⁵ but a bill of exchange drawn by the association may be governed by the laws of the place where it is made payable.⁶

1 Tappan v. Bailey, 4 Met. 529, 535; Herod v. Rodman, 16 Ind. 241, Wells v. Gates, 18 Barb. 554; § 325, *ante*. Compare Bright v. Hutton, 3 H. L. Cas. 341.

2 Park v. Spaulding, 10 Hun, 126; and see Kingsland v. Braisted, 3 Lana. 17.

3 Moore v. Brink, 4 Hun, 402; 6 Thomp. & C. 22.

4 Robinson v. Robinson, 10 Me. 240; Ridgely v. Dobson, 3 Watts & Berg. 118. See § 329, *ante*.

5 Cutler v. Thomas, 25 Vt. 73. Compare Lynch v. Postlethwaite, 7 Mart. 69; 12 Am. Dec. 495.

6 Cutler v. Thomas, 25 Vt. 73.

§ 332. Funds and assets.—The members of a voluntary association have no severable proprietary interest in the property of the association, or a right to any proportionate part of it if they resign, forfeit their membership, or are expelled.¹ They have merely the enjoyment and use of the property while members, and if they are then members, a right to a proportionate share of its assets when the association is dissolved.² And the individual members have no power, except in their collective capacity, to dispose of the property or effects of the association, or of any supposed proportionate part or interest therein.³ A majority of the members present at a regu-

larly convened meeting of the association may, however, appropriate its funds to any purpose within the scope of the general object.⁴ But they can only be thus applied, and money contributed to relieve a district from a draft for military service cannot, by a vote of a mere majority of the contributors, be appropriated to the establishment of a city dispensary.⁵ So the profits of a fair conducted by a voluntary association, must be applied to the purposes for which the fair was held, and this may be enforced.⁶ The property of the association must be appropriated to pay the debts of creditors who are not members before it can be applied towards payment of the claims of its members.⁷

1 *McMahon v. Rauhr*, 47 N. Y. 67; 3 *Daly*, 116.

2 *White v. Brownell*, 4 Abb. Pr. N. S. 162; 2 *Daly*, 329; and see *Fassett v. First Parish etc.* 19 Pick. 361; *St. James Club*, 13 Eng. L. & Eq. 692; *Brown v. Dale*, *Lans. R.* 9 Ch. Div. 78; 25 Eng. 776.

3 *McMahon v. Rauhr*, 3 *Daly*, 116.

4 *Abels v. McKean*, 18 N. J. Eq. 462.

5 *Abels v. McKean*, 18 N. J. Eq. 462. Compare *Torrey v. Baker*, 1 Allen, 120; *Thomas v. Ellmaker*, 1 *Para. Sel. Cas.* 98.

6 *Morton v. Smith*, 5 *Bush*, 467.

7 *Babb v. Reed*, 5 *Rawle*, 161.

§ 333. **Rights of action.**—A member cannot maintain an action at law against the association, unless the right to do so was given by the conditions of the agreement under which the members were united into a body;¹ neither can his assignee.² But he may have a remedy against the individual members of the association in equity.³ A minority of the members have a right to enjoin the majority from distributing the funds among the members in a manner different from that provided by the constitution, without a vote, according to the constitution, to make the necessary alteration.⁴ A member is not entitled to compensation for conducting the business of the association;⁵ though he may recover for services rendered to the association previous to his becoming a member of it.⁶ An association of workmen, not formed for

an illegal purpose, can maintain an action to recover money belonging to them, although in attempting to carry out the lawful purpose of the association they have been guilty of illegal acts.⁷ And in an action by an association against its treasurer to recover the funds of the society, the defendant cannot set up in defense thereto the unlawful purpose and object of the society.⁸ An action on a promissory note, signed by the directors, as such, of a voluntary association, should be brought against all the members;⁹ though, in the absence of any plea in abatement for non-joinder, the action is maintainable against the signers alone.¹⁰ And one whose name was signed to the articles of association without authority or ratification may properly be omitted as a defendant.¹¹ Under the statute of New York, the president or treasurer of any association consisting of seven or more members may sue or be sued, on behalf of such association, in any of the courts of the state.¹² Nor is the operation of the statute confined to associations in the state, but it applies to all associations that come into court under it.¹³

1 *Habicht v. Pemberton*, 4 Sand. 657; *Cheeny v. Clark*, 3 Vt. 431; 22 Am. Dec. 219. Compare *Sharp v. Warren*, 6 Price, 131.

2 *Bullard v. Kinney*, 10 Cal. 60; *McMahon v. Rauhr*, 3 Daly, 116; 47 N. Y. 67.

3 See *Butterfield v. Beardsley*, 28 Mich. 412; *Dennis v. Kennedy*, 19 Barb. 517.

4 *Torrey v. Baker*, 1 Allen, 120; and see *Marrton v. Durgin*, 54 N. H. 347; *Barker v. White*, 58 N. Y. 204; *Nachtrieb v. Harmony Settlement*, 3 Wall. Jr. 66.

5 *Coal Company v. Fry*, 4 Phila. 129.

6 *Lucas v. Beach*, 1 Man. & G. 417; and see *Spiller v. Paris Skating Rink Co.* Law R. 7 Ch. Div. 368; 23 Eng. 649.

7 *Snow v. Wheeler*, 113 Mass. 179.

8 *Willson v. Owen*, 30 Mich. 474.

9 *McGreary v. Chandler*, 58 Me. 537.

10 *McGreary v. Chandler*, 58 Me. 537.

11 *Boyd v. Merrell*, 52 Ill. 151.

12 4 Edm. Stat. at Large, 650, 651; *Olery v. Brown*, 51 How. 92; *Schmidt v. Gunther*, 5 Daly, 452; and see *Ebbinghausen v. Worth Club*, 4 Abb. N. C. 300.

13 *Clancy v. Terhune*, 1 City Court R. (N. Y.) 239. Under the Connecticut law, a company in a militia regiment is a voluntary association, which may be sued by the name by which it is known: *Fox v. Naramore*, 36 Conn. 376.

§ 334. **Dissolution.**—The relation of members of a voluntary unincorporated association is ordinarily such as to justify a court of equity, in order to settle their disputes respecting the distribution of a common fund, to treat them as partners.¹ In case of violent dissensions and irreconcilable differences among the members, judgment will be rendered at the suit of one or more members against all the others, dissolving the association.² But a suit will not be entertained for such a purpose upon mere proof of differences of opinion, bad temper, the ordinary disputes common to such societies;³ nor upon proof of injuries or injustice sustained by one member, through the action or vote of the society, if he has another remedy.⁴ Where a voluntary association voted to transfer its funds to another society, appointed a committee to make the transfer, and ceased to meet for five years, it was held to be dissolved.⁵ And excluding a member from the privileges of membership, or one elected an officer from the exercise of his office, may be ground for decreeing a dissolution.⁶

1 *Butterfield v. Beardsley*, 23 Mich. 412; and see *Mann v. Butler*, 2 Barb. Ch. 362. Compare *Brown v. Dale*, Law R. 9 Ch. Div. 78; 25 Eng. R. 776.

2 *Lafond v. Deems*, 52 How. Pr. 41; 1 Abb. N. C. 318. Compare *S. C.* 8 Abb. N. C. 344; *Howell v. Harvey*, 5 Ark. 278; *Durbin v. Barber*, 14 Ohio, 318.

3 *Fischer v. Raab*, 57 How. Pr. 87.

4 *Fischer v. Raab*, 57 How. Pr. 87; *Lafond v. Deems*, 8 Abb. N. C. 344.

5 *Penfield v. Skinner*, 11 Vt. 296. Compare *Strickland v. Prichard*, 37 Id. 324.

6 See *Gorham v. Russell*, 14 Cal. 531; 18 Id. 688; *Berry v. Cross*, 3 Sand. Ch. 1. If the articles fix a definite time for the continuance of the association, the members cannot dissolve before that time, except by unanimous consent: *Von Schmidt v. Huntington*, 1 Cal. 55.

§ 335. **Expulsion of members.**—The members of a voluntary association must be held to their contract, as expressed in the constitution, by-laws, or rules of the association.¹ If the rules provide for expulsion upon certain grounds, and direct a mode of proceeding before a committee or tribunal of the association to ascertain

whether in a given case such grounds exist, a member cannot, when they are invoked against himself, resort to a court of justice to prevent them from being put in force.¹ By-laws, whether they are reasonable or not, bind the members of a voluntary association.² But by-laws must not be inconsistent with the general municipal law;³ and when a member refuses to submit to the ceremony of expulsion established by the association, which ceremony involves a battery, it cannot be lawfully inflicted, although warranted by the by-laws.⁴ So an injunction will be allowed, in a proper case, to restrain the unlawful expulsion of a member for alleged violation of rules;⁵ provided, the complainant has no remedy under the constitution and by-laws of the association itself, which has not been exhausted.⁷ And a clear case of injustice must be shown to justify the interference of the courts to review the proceedings of an association for the expulsion of a member.⁸

¹ *Lafond v. Deema*, 52 How. Pr. 41; 1 Abb. N. C. 318; and see *Hopkinson v. Marquis of Exeter*, Law R. 5 Eq. Cas. 63.

² *White v. Brownell*, 3 Abb. Pr. N. S. 318; 4 Id. 162; 2 Daly, 329.

³ *Elsas v. Alford*, 1 City Court R. (N. Y.) 123.

⁴ *State v. Williams*, 75 No. Car. 134.

⁵ *State v. Williams*, 75 No. Car. 134.

⁶ *Leach v. Harris*, 2 Brews. 571.

⁷ *Olery v. Brown*, 51 How. Pr. 92.

⁸ *People v. St. George's Society*, 23 Mich. 261. Compare *Savannah Cotton Exchange v. State*, 54 Ga. 668; *Hopkinson v. Marquis of Exeter*, Law R. 5 Eq. 63.

§ 336. Clubs.—English clubs or societies, not constituted for any purposes of profit, are not partnerships;¹ and the members are not partners even as against third persons.² Nor are such clubs to be deemed "companies" within the joint-stock companies' winding-up acts.³ If liabilities attach to any of their members, it is by reason of the acts of such members themselves, or of the acts of their agents.⁴ It is however held, in this country, that where persons form themselves into a club or association for social and recreative purposes, and assume a name under which they incur liabilities, the members thereof

become jointly liable for any indebtedness thus incurred.⁵ The sale of liquor to its members by an unincorporated club or association, formed to promote social and literary objects, subjects it to revenue tax as a retail dealer, and renders the club, or any member thereof, criminally liable in case of failure to pay such tax.⁶

1 *Fleming v. Hector*, 2 Mees. & W. 172; § 325, *ante*. Compare *De-laney v. Strickland*, 2 Stark. 416.

2 *Fleming v. Hector*, 2 Mees. & W. 172.

3 *Re St. James' Club*, 2 De Gex, M. & G. 383; 13 Eng. L. & Eq. 589.

4 *Cockerell v. Ancompte*, 2 Com. B. N. S. 440; 40 Eng. L. & Eq. 279; and see *Wood v. Finch*, 2 Fost. & F. 447; *Todd v. Emly*, 3 Mees. & W. 595; *Coldicott v. Griffiths*, 8 Exch. 898.

5 *Park v. Spaulding*, 10 Hun. 128. Compare *Ebbinghausen v. Worth Club*, 4 Abb. N. C. 300. As to the formation of clubs for social and recreative purposes under the New York statute: see *Laws of 1865*, ch. 368; amended *Laws of 1870*, ch. 668.

6 *United States v. Wittig*, 22 Int. Rev. Rec. 98; 2 Low. Dec. 466; and see *Martin v. State*, 59 Ala. 34; *Rickart v. People*, 79 Ill. 85.

§ 337. **Joint-stock companies.**—A joint-stock company is a *quasi* partnership, invested by statutes in England, and in many of the states of the Union, with some of the privileges of a corporation.¹ Thus, the effect of the New York statutes relative to joint-stock companies is,² to give them all the qualities or attributes of corporations, except the right to have and use a common seal.³ But no greater formalities for the formation of such companies or associations are required, as it respects membership, than for the formation of ordinary partnerships.⁴ It is not even necessary that there should be any subscription to such association in writing by the members thereof.⁵ And a certificate of stock is not necessary to constitute one a member of such association.⁶ But where the interest of a member is represented by such certificate, he can sell and transfer it by a simple indorsement.⁷ The association may be sued by one of its members in the same manner as a corporation;⁸ and it is properly sued in the name of its president.⁹ The association may sue in the name of its president, and it has the same capacity to sue in a court of the United States as has a

state corporation.¹⁰ Proceedings for dissolution, in cases of insolvency, are to be conducted substantially according to the methods employed in the case of insolvent corporations.¹¹ The words "joint-stock company," as used in the statutes of Massachusetts, refer to companies organized under general laws as corporations.¹² They describe a partnership made up of many persons acting under articles of association for the purpose of carrying on a particular business, and having a capital stock divided into shares transferable at the pleasure of the holder.¹³ Persons associating themselves together to form a joint-stock company, under the Maine statute, must obtain the certificate of the attorney-general;¹⁴ otherwise, they do not become a corporation.¹⁵ An English joint-stock company is held to be a corporation in this country;¹⁶ and such corporations, whether organized under the laws of a state of the Union, or a foreign government, may be taxed in another state for the privilege of conducting their corporate business within the latter.¹⁷ It has, however, been held, that a joint-stock company formed under the New York statutes is not a corporation, and that its members may be sued as partners in another state.¹⁸ In a joint company, the presumption is, that the executors of a deceased shareholder succeed to the full liability, as well as to the rights of their testator.¹⁹

1 See 1 Bouv. Dict. 757; 1 Pars. Cont. 121; Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566; Womersley v. Merritt, Law R. 4 Eq. 695.

2 Laws of 1849, ch. 258; id. 1851, ch. 455; id. 1853, ch. 153.

3 Waterbury v. Merchants' etc. Express Co. 3 Abb. Pr. N. S. 163; 50 Barb. 157.

4 National Bank v. Van Derwerker, 74 N. Y. 234.

5 National Bank v. Van Derwerker, 74 N. Y. 234.

6 Farrar v. Walker, 3 Dill. 506, note.

7 Waterbury v. Merchants' etc. Express Co. 3 Abb. Pr. N. S. 163; 50 Barb. 157.

8 Westcott v. Fargo, 61 N. Y. 542; 19 Am. R. 300; Saltsman v. Shultz, 14 Hun, 236; Shaw v. Cock, 12 id. 173.

9 National Bank v. Van Derwerker, 74 N. Y. 234; and see Schmidt v. Gunther, 5 Daly, 452; Corning v. Greene, 23 Barb. 33.

10 Fargo v. McVicker, 55 Barb. 437.

11 *Waterbury v. Merchants' etc. Express Co.* 3 Abb. Pr. N. S. 163; 50 Barb. 157.

12 *Att.-Gen. v. Insurance Co.* 121 Mass. 524.

13 *Att.-Gen. v. Insurance Co.* 121 Mass. 524; *Bodwell v. Eastman*, 106 Id. 525.

14 *Rev. Stat. ch. 48.*

15 *Richmond etc. Assoc. v. Clark*, 61 Me. 351.

16 *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566.

17 *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566; 100 Mass. 521.

18 *Boston etc. R. R. Co. v. Pearson*, 128 Mass. 445; *Taft v. Ward*, 106 Id. 518; *Frost v. Walker*, 60 Me. 468.

19 *Re Agriculturist Cattle Ins. Co.* Law R. 5 Ch. 725.

§ 338. Benefit societies.—The purpose of benefit or friendly societies is not business, trade, or profit, but the benefit and protection of their members, as provided for in the constitution and by-laws.¹ Such societies are not insurance companies,² nor are they to be regarded as institutions of public charity.³ And a voluntary association formed for the benefit and protection of its members, but having no power to compel payment of dues, and whose right of membership ceases upon a failure to pay annual subscriptions, is not a partnership.⁴ In England, and in many of the states, such societies are regulated by statute;⁵ and their purposes and objects are mainly determined by the provisions of the special acts relating to them.⁶ A corporation for business purposes, having in view the pecuniary profit of its members, is not within a statute providing for the incorporation of benevolent societies.⁷ And a society whose main purpose is the relief of sick, disabled, and aged members, and the burial of dead members, but which adds thereto the propagation and maintenance of trades unionism, is not a friendly society.⁸ But the constitution and by-laws should have a liberal interpretation, for the purpose of promoting the general objects of the society;⁹ and therefore, a corporation having in view the welfare of its members, and particularly their relief in times of sickness and distress, may extend its benefits to the families of its members, and make provision for the widows of deceased members.¹⁰ And power
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conferred by the charter of a benevolent and loan association, to loan money "upon personal security and the pledge of goods and chattels," authorizes loans upon personal security without any pledge of goods and chattels.¹¹ A by-law of a benefit society providing that benefit shall be withheld from widows of members who die through intemperance, debauchery, etc., is not an unreasonable regulation.¹² But a by-law operating as a forfeiture of the widow's right to the benefits, because the member's dues, although fully satisfied, were not paid at the precise time required, was held to be void.¹³ So by-laws which forbid a member to work at his trade at such prices as he chooses to accept, and which compel him to join in a strike, are void, as against public policy.¹⁴ And a member expelled for the violation of a by-law not authorized by statute nor by the state constitution will be restored by mandamus;¹⁵ though, if such expelled member brings an action for damages for the expulsion and recovers judgment, it is a waiver of his right to be restored by mandamus.¹⁶ Members cannot be expelled on charges without notice and an opportunity of being heard.¹⁷ And even though the party charged does not appear, still proof of his offense should be required.¹⁸ It is not illegal for a benevolent society to hold business meetings or to transact its business on Sunday.¹⁹ On the death of a member of a beneficial association, the share in the common fund going to his family is not assets of his estate, governed by his will or the statute of distributions;²⁰ but is to be distributed in the amounts and order which the regulations of the association direct.²¹ The object of benefit building societies is, "that any individual member may borrow money from the society to enable him to buy or build a house, mortgaging it to the society as security for the money borrowed, and ultimately making it absolutely his own, by paying off the mortgage out of his subscription."²² These societies are formed under statutes enacted for the purpose, in England and in this country,²³

and their mode of operation is likewise fully prescribed by statute.²⁴ Unconscionable contracts made by them, in violation of the laws restricting interest, are held to be subject to the penalties of usury, irrespective of the terms or forms employed.²⁵ It is however held, that a mortgage given to a building society by a holder of its stock is not usurious because monthly payments of interest are required, besides fines and impositions in accordance with the provisions of the constitution of the society.²⁶ A building society having authority under its charter to make a loan and provide for the security of the same, may, as an incident of such right, provide for insuring property taken in security.²⁷ Such society, incorporated under the Maryland statute, has power to make a promissory note.²⁸ And an English building society is enabled by the present statute to borrow money.²⁹ Upon redeeming its stock, a building society acquires the right of property therein.³⁰

1 *Lafond v. Deems*, 8 Abb. N. C. 344.

2 *Courtenay v. Courtenay*, 4 Jones, L. 519; and see *State v. Mut. Protection Soc.* 26 Ohio St. 19.

3 *Morning Star Lodge v. Hayslip*, 23 Ohio St. 144; *Swift v. Beneficial Soc.* 73 Pa. St. 362; *Re Clark's Trust*, Law R. 1 Ch. Div. 497; 16 Eng. R. 624.

4 *Lafond v. Deems*, 8 Abb. N. C. 344; and see *Sharp v. Warren*, 6 Price, 131; *Bear v. Broinley*, 11 Eng. L. & Eq. 414. Compare § 325, *ante*; *Wolf v. Schlieffer*, 2 Brewst. 563; *Huntington v. Savings Bank*, 56 U. S. 294.

5 See *Pare v. Clegg*, 29 Beav. 589; *Re Owen*, 31 id. 285; *Hornby v. Close*, Law R. 2 Q. B. 153; *Industrial Soc. v. Pickles*, Law R. 1 Exch. 1; *State v. Mut. Protection Assoc.* 26 Ohio St. 19; *People v. Nelson*, 46 N. Y. 477.

6 See Stat. 18 and 19 Vict. L. T. ch. 63, § 9; Laws of N. Y. 1849, ch. 319.

7 *People v. Nelson*, 46 N. Y. 477; 10 Abb. Pr. N. S. 200; 3 Lans. 324.

8 *Hornby v. Close*, Law R. 2 Q. B. 153. Compare *Pare v. Clegg*, 29 Beav. 589.

9 *Gundlach v. Germania etc. Assoc.* 4 Hun, 339. Insanity is "sickness," within the meaning of a rule of a friendly society, providing for a weekly allowance to any member during any sickness, etc. *Burton v. Eyden*, Law R. 8 Q. B. 295.

10 *Gundlach v. Germania etc. Assoc.* 4 Hun, 339. Compare *Figure v. Mutual Soc.* 46 Vt. 362.

11 *Missouri Loan Bank v. Howe*, 56 Mo. 53.

12 *St. Mary's etc. Soc. v. Burford*, 70 Pa. St. 321. Compare *Berlin v. March*, 82 Pa. St. 168.

13 *Brecking v. Robert Blum Lodge*, 1 City Court R. (N. Y.) 51; and see *Cartau v. Father Matthew Soc.* 3 Daly, 20.

14 *People v. Benevolent Soc.* 3 Hun, 361.

15 *People v. Benevolent Soc.* 24 How. Pr. 216; and see tit. MANDAMUS.

16 *State v. Lips*, 29 Ohio St. 665.

17 *People v. Benevolent Soc.* 24 How. Pr. 216. Compare § 335, *ante*.

18 *People v. Young Men's etc. Soc.* 65 Barb. 357.

19 *People v. Young Men's etc. Soc.* 65 Barb. 357.

20 *Arthur v. Odd Fellows Ben. Assoc.* 29 Ohio St. 557; and see *Maryland etc. Soc. v. Clendinnen*, 44 Md. 423.

21 *Arthur v. Odd Fellows' Ben. Assoc.* 29 Ohio St. 557.

22 *In re Kent Benefit Building Soc.* 1 Drew & S. 417. Compare *People v. Troy House Co.* 44 Barb. 625; *Howard v. Mut. Loan etc. Assoc.* 3 Allen, 571; *Copland v. Bartlett*, 6 Conn. B. 18.

23 See Stat. 37 & 38 Vict. L. T. ch. 42; Laws of N. Y. 1851. ch. 122; Laws of Penn'a, 1853, p. 544; *Nelson v. Blakey*, 54 Ind. 29; *Mok v. Detroit etc. Assoc.* 50 Mich. 511.

24 See *Spinning v. Home Build. etc. Assoc.* 26 Ohio St. 483; *Link v. Germantown etc. Assoc.* 81 Pa. St. 15; *Low etc. v. Zucker*, 48 Md. 449; *Matter of Tierney*, Law R. 9 Eq. (Ir.) 1; *Provident etc. Build. Soc. v. Greenhill*, Law R. 9 Ch. Div. 122; 25 Eng. 824; *Second Manhattan Build. Assoc. v. Hayes*, 4 Abb. N. Y. App. 183; *Ottawa etc. Assoc. v. Scott*, 24 Up. Can. Q. B. 341; *Fabst v. Build. Assoc.* 1 McAr. 383.

25 *Mills v. Salisbury etc. Assoc.* 75 No. Car. 222; *Houser v. Hermann Build. Assoc.* 41 Pa. St. 478; and see *Gordon v. Winchester Build. etc. Assoc.* 12 Bush, 110; *Baltimore etc. Build. Assoc.* 41 Md. 409; *State v. Greenville Build. etc. Assoc.* 23 Ohio St. 92; *Canada etc. Assoc. v. Rowell*, 19 Up. Can. Q. B. 124; *Citizens etc. Assoc. v. Uhler*, 48 Md. 455; *Mulloy v. Build. Assoc.* 2 McAr. 544.

26 *Red Bank Mut. etc. Assoc. v. Patterson*, 27 N. J. Eq. 222; and compare *Forrest City etc. Assoc. v. Gallagher*, 25 Ohio St. 204; *City Build. etc. Co. v. Fatty*, 1 Abb. N. Y. App. 347; *Willard v. Baltimore etc. Assoc.* 45 Md. 548; *Morrison v. Glover*, 4 Ex. 430; *Provident etc. Build. Soc. v. Greenhill*, Law R. 9 Ch. Div. 122; 25 Eng. R. 824.

27 *Chicago Build. Soc. v. Crowell*, 65 Ill. 453.

28 *Davis v. West etc. Union*, 22 Md. 285. Compare *Muth v. Dohfield*, 45 Md. 468.

29 See Stat. 37 & 38 Vict. L. T. ch. 42, § 15; *Re Victoria etc. Soc. Law R. 9 Eq. 605*; *Davis and Wilson's Case*, Law R. 12 Eq. 516; *Re National etc. Soc. Law R. 5 Ch. 309*.

30 *Winchester etc. Assoc. v. Gilbert*, 23 Gratt. 787; *White v. Mechanics' etc. Assoc.* 22 Ill. 233. See as to winding-up and distribution of fund: *Re Professional etc. Build. Soc. Law R. 6 Ch. 856*; *Re Durham etc. Build. Soc. Law R. 12 Eq. 513*; *Wilson v. Up. Can. etc. Soc.* 13 Grant U. C. 206; *Goodrich v. City Loan etc. Assoc.* 51 Ga. 98; *Edell v. Pascoe*, 22 Gratt. 826; *State v. Central etc. Assoc.* 29 Ohio St. 399.

§ 339. **Charitable societies.**—A corporation for business purposes, although such purposes may incidentally contemplate benevolent results, is not within a general act providing for the incorporation of charitable, etc.,

societies.¹ And a beneficial society, the benefits of which extend only to contributing members, is not charitable.² The term "charitable institution" designates a corporation or other organized body created to administer charities, and which is permanent in its nature, as contradistinguished from a transient or temporary undertaking.³ But a corporation is not the less "charitable" because its rules require an entrance fee from each applicant for admission,⁴ or that patients able to pay for nursing and treatment shall do so.⁵ And the fact that no person has individually a right to demand admission into a public hospital, and that the trustees of the hospital determine who are to be received, does not render it any the less a public charity.⁶ An incorporated society having for its object the promulgation of Christian knowledge and intelligence, through its agency as an institution of domestic missions, is a charitable institution.⁷ A corporation established for the maintenance of a public charitable hospital, which has exercised due care in the selection of its agents, is not liable for an injury to a patient caused by their negligence, nor for the unauthorized assumption of one of the hospital attendants to act as a surgeon.⁸ The president and trustees of a charitable corporation, there being no shareholders, may dissolve it;⁹ and the property of the corporation, real and personal, acquired by purchase for value, thereupon vests in the state;¹⁰ but real property acquired and held by gift, remaining undisposed of, reverts to the donor or his heirs.¹¹ A gift of property for charitable purposes cannot be diverted by the legislature.¹²

1 *People v. Nelson*, 46 N. Y. 477; 10 Abb. Pr. N. S. 200; 3 Lans. 324.

2 *Swift v. Beneficial Soc.*, 73 Pa. St. 362; *Morning Star Lodge v. Hayslip*, 23 Ohio St. 144; *Re Clark's Trust*, Law R. 1 Ch. Div. 497; 16 Eng. 624.

3 *Humphries v. Little Sisters of the Poor*, 29 Ohio St. 201.

4 *Gooch v. Assoc. for Relief etc.*, 109 Mass. 558.

5 *McDonald v. Mass. General Hospital*, 120 Mass. 432.

6 *Gooch v. Assoc. for Relief etc.*, 109 Mass. 558.

7 *Maine Baptist etc. Convention v. Portland*, 65 Me. 92.

8 McDonald v. Mass. General Hospital, 139 Mass. 432; and see *Holiday v. St. Leonard's*, 11 Conn. B. N. R. 192.

9 *People v. College of California*, 33 Cal. 166.

10 *People v. College of California*, 33 Cal. 166.

11 *People v. College of California*, 33 Cal. 166. Compare *Folger v. Chase*, 18 Pick. 63, 66; *White v. Campbell*, 5 Humph. 38. See tit. DIS-SOLUTION.

12 *Venable v. Coffman*, 2 W. Va. 310; *Plymouth v. Jackson*, 15 Pa. St. 44; and compare *Stanley v. Colt*, 5 Wall. 119; *Att.-Gen. v. Clergy Soc.*, 10 Rich. Eq. 604; *In re Prison Charities*, Law R. 16 Eq. 129; 16 Eng. 670.

§ 340. **Charitable uses.**—It is now the prevailing opinion in this country and in England, that a court of general equitable jurisdiction has power to enforce charities, independent of the statute of 43 Elizabeth.¹ Charitable uses are favorites with courts of equity, and the construction of all instruments where they are concerned is liberal in their behalf.² There may, however, be such uncertainty as to the objects of a charitable use as to render it invalid;³ as in case of a bequest to be applied to foreign missions and to the "poor saints";⁴ or a bequest to trustees for the support of "indigent pious young men preparing for the ministry in New Haven";⁵ or a bequest "for the establishment of a school at M. for the education of children."⁶ But the beneficiaries need not be named, and any description by which they can be identified is sufficient.⁷ So leaving it to the executor to choose between two designated objects was held not to be a fatal uncertainty.⁸ A bequest to a charitable society was sustained, notwithstanding the objection that such society had never obtained a statutory incorporation.⁹ A municipal corporation may be a trustee for a charitable purpose.¹⁰ So may a town,¹¹ or county;¹² but otherwise of a state, or the United States.¹³ Among gifts for charitable uses, which have been sustained as such, are the following: Bequests for the circulation of Bibles and other religious books;¹⁴ a gift of land for the erection of a building for public worship;¹⁵ a bequest to promote the propagation of Christianity among the heathen;¹⁶ an en-

dowment creating a fund, the interest to be expended for the relief of the Jewish poor of the city of P.;¹⁷ an endowment to support measures for "the protection of the property of our fellow-citizens from fire";¹⁸ a bequest of a fund, the interest to be applied to the increase of the Sunday-school library of a designated church;¹⁹ a legacy to a town for the purpose of erecting a town-house;²⁰ and a provision in a will to establish an institution "for the benefit, tuition, and advancement in learning of the youth residing from time to time hereafter in the state of New Jersey."²¹ In Delaware, the court of chancery has succeeded to the jurisdiction exercised by the English chancery over charitable uses;²² and if the objects of a charitable use are uncertain, the charity may be administered by the court of chancery.²³

1 *Rose v. Rose*, 4 Abb. N. Y. App. 108; *Grimes v. Harmon*, 35 Ind. 198; *Commissioners etc. v. Rogers*, 55 Id. 297; *Williams v. Pearson*, 38 Ala. 271; *Miller v. Porter*, 53 Pa. St. 292; *Thornton v. Howe*, 31 Reav. 14; *Att.-Gen. v. St. Cross Hospital*, 17 Id. 435; *Hayman v. Rugby School*, Law R. 18 Eq. 28.

2 *Mills v. Farmer*, 19 Ves. 493; *Ould v. Washington Hospital*, 95 U. S. 303; *Adye v. Smith*, 44 Conn. 60; 28 Am. R. 424; *Russell v. Allen*, 5 Dill. 235.

3 *Heiss v. Murphy*, 40 Wis. 276; *Lepage v. McNamara*, 5 Iowa. 124; *Wilderman v. City of Baltimore*, 8 Md. 551; *Dashiell v. Att.-Gen.* 5 Har. & J. 392; 9 Am. Dec. 572; *Levy v. Levy*, 33 N. Y. 97.

4 *Bridges v. Pleasants*, 4 Ired. Eq. 26.

5 *White v. Fisk*, 22 Conn. 31.

6 *Att.-Gen. v. Soule*, 28 Mich. 153; and see *Heiss v. Murphy*, 40 Wis. 276.

7 *Holmes v. Mead*, 52 N. Y. 332. Compare *Roy v. Rowzie*, 25 Gratt. 599; *Cruise v. Axtell*, 50 Ind. 49; *Brewster v. McCall*, 15 Conn. 274; *St. Luke's Home v. Indigent Females*, 52 N. Y. 191; *De Bruler v. Ferguson*, 54 Ind. 549; *Griffith v. State*, 2 Del. Ch. 421; *Needles v. Martin*, 33 Md. 603.

8 *Fairbanks v. Lamson*, 99 Mass. 533.

9 *Cromie v. Louisville etc. Soc.* 3 Bush, 365. But see *State v. Warren*, 28 Md. 338.

10 *Philadelphia v. Fox*, 64 Pa. St. 169; *Vidal v. Girard*, 2 How. 127.

11 *Fellows v. Miner*, 119 Mass. 541; and see *Mason v. Trustees etc.* 27 N. J. Eq. 47.

12 *County of Lawrence v. Leonard*, 83 Pa. St. 206; *Commissioners v. Rogers*, 55 Ind. 297.

13 *United States v. Fox*, 52 N. Y. 570; 94 U. S. 315.

14 *Mason v. Trustees etc.* 27 N. J. Eq. 47; *Bliss v. Am. Bible Soc.* 2 Allen, 334; *Fairbanks v. Lamson*, 99 Mass. 533; *Att.-Gen. v. Stepney*, 10 Ves. 22. But see *Starkweather v. Am. Bible Soc.* 72 Ill. 50.

15 Old South Soc. v. Crocker, 119 Mass. 1. Compare Baptist Soc. v. Hall, 8 R. I. 234.

16 Bartlett v. King, 12 Mass. 636; 7 Am. Dec. 99; and see Maine Baptist etc. Convention v. Portland, 65 Me. 92.

17 Mayer v. Soc. etc. 2 Brewst. 385.

18 Bethlehem v. Perseverance Fire Co. 81 Pa. St. 445.

19 Fairbanks v. Lamson, 99 Mass. 533.

20 Coggeshall v. Pelton, 7 Johns. Ch. 292.

21 Stevens v. Shippen, 28 N. J. Eq. 437. And see Att.-Gen. v. Sidney Sussex College, Law R. 4 Ch. 722; Wilkinson v. Malin, 2 Cromp. & J. 636; University of London v. Yarrow, 23 Beav. 159; Power v. Cassidy, 71 N. Y. 602; 35 Am. R. 550. But a devise to the "Infidel Society" in P., for the erection of a hall for the free discussion of religion, politics, etc., was held not to be for a charitable use: Zelsweis v. James, 63 Pa. St. 485.

22 Griffith v. State, 2 Del. Ch. 421.

23 Griffith v. State, 2 Del. Ch. 421.

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